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Sunbelt Justice:

Politics, the Professions, and the History of

Sentencing and Corrections in Texas since 1968

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by

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Sunbelt Justice:

Politics, the Professions, and the History of

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In late 20th-century Texas, during decades of rapid economic growth and abrupt social transformation, traditional state institutions and other features of a less affluent Southern past persisted side by side with the modern and newly developed. Criminal justice, in Texas as in other states, became a realm that was fiercely contested politically and in the courts. Sentencing and corrections, in particular, bore the brunt of changes promoted by the frequently conflicting forces of federal grant aid to states and federal judicial intervention. In the case of Texas, comprehensive reforms ordered by federal

courts became a crucial, if limited, impetus for change that challenged the resistance of the political establishment. The courts typically sought to compel state institutions to meet standards of service provision set by professional experts and certifying organizations. The lead role played by federal courts—rather than Texas professionals themselves and their statewide organizations—in advocating for reforms indicates that in a state political environment marked by a tendency toward concentrated power, and with few independent, politically insulated institutions of their own, Texas doctors, lawyers, academics, and other professionals had few active roles to play. As examples of court-ordered reform, the cases of prison medical care and juvenile confinement both display the chronic abasement of professional standards by state institutions, the limits of effective judicial intervention over time, and the long-term cyclical patterns of state politics. Other episodes of attempted reform—the use of federal grant funds originally intended to upgrade criminal justice agencies, and a succession of initiatives to change the criminal sentencing code—demonstrate the prevalence of political pressures over state-supported professional expertise. The particular importance of physicians—and the absence of state medical organizations—in promoting the revival of a modernized death penalty is emphasized by a comparison with England, where doctors asserted a professional interest in criminal justice policies and preempted the medicalization of capital punishment. Ultimately the fate of each of these initiatives in the realm of sentencing and correction reflects the pressures tending against the creation and maintenance of independent professional authority in Texas.

Contents

Introduction

"But This Is Texas": Crime and Punishment, Sunbelt Politics, and the Theory and History of Professions

"The causes of crime, the reach of crime, the reality of crime—all these are national in scale and scope," historian Lawrence Friedman has observed. "Criminal justice, on the other hand, is as local as local gets."[1] Friedman's truism about scale and scope reflects the impact of the 1960s, when crime—specifically predatory crime, or "crime in the streets"—became a nationwide preoccupation and a national political issue. With the Omnibus Crime Control and Safe Streets Act of 1968, Congress and the President began a policy of using federal aid to "improve and strengthen" the far-flung, deeply local institutions of law enforcement and criminal justice. Since then, billions of dollars in federal grants, mostly channeled through state-level planning councils, have flowed to local and state police departments, prosecutors, courts, and prison systems.

At the same time, other federal policies have sought to promote equity in criminal justice and to protect constitutional rights. Starting with the Warren Court's criminal procedure rulings in the 1960s—against which the Safe Streets legislation, in its final form, represented a backlash—the era of congressional and executive-branch initiatives has coincided with far-reaching intervention by federal courts. Litigation over prisons and jails has been the leading example, having been pursued in most jurisdictions

[1] Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), p. 461.

nationwide and having transformed correctional practices in all of them.[2] Activists for prisoners' rights and the judges who heard their cases developed a new body of law that changed not only prison conditions but a host of related criminal-justice policies and practices. Sentencing and corrections, in particular, bore the brunt of changes promoted by the frequently conflicting forces of grant aid and court orders.

These changes in criminal justice constitute a new, problematic frontier for historical inquiry. While formal policy analysis has sought to isolate the impact of particular initiatives and evaluate their effectiveness in terms of their stated goals, interpretations of historical significance attempt to fulfill a broader mandate. Still, the complexities of criminal justice, with its nonsystematic arrangement of interrelated but autonomous agencies and functions, present considerable challenges to a coherent narrative. Perhaps the most important factor in identifying a manageable research focus in this field is the distinct pattern of decentralization. While law enforcement has remained largely (although far from entirely) a responsibility of local institutions, other criminal justice functions, such as the creation of criminal statutes and the administration of prisons, involve state-level policies and agencies. Federal grant formulas and planning directives have applied chiefly to states, and most (though not all) formal policy analysis has evaluated state-level planning and program administration. Mainly for these reasons, the task of assessing federal intervention in criminal justice lends itself to a single-state case study. This approach should gain in richness more than it gives up in claims to representativeness. Also, by allowing for thorough treatment of the context of ongoing

[2] For the full list of jurisdictions, see the ACLU National Prison Project's *Status Report*, January 1995, pp. 1-2.

processes of change in a single locale, it can portray the impact of federal policy in an appropriate perspective—relating it to other factors, weighing its relative significance, and appreciating its limits.

In contemporary Texas, as in the past, controversies about crime and punishment reflect—and reinforce—the state's peculiar reputation. Violent crime itself, as the object of daily fear and guilty fascination, has pervaded the public discourse, and influenced not just familiar social arrangements (like electoral politics, or real estate development, or public school curricula) but the construction over time of the most basic and enduring social distinctions (race, gender, class). Criminal sentencing and corrections—the object of this study—are ostensibly among the means by which society responds directly to the crime problem, but as it contributes its share to the social construction of the problem, its agents and institutions function in ways that reflect their own histories. In the Texas system, as the following chapters will show, much of the history is about conflict among decentralized local authorities (county sheriffs, city police, and locally elected state district attorneys and judges) and central state institutions (specialized law enforcement agencies, the appeals courts, and the prison, parole, and probation systems). Nevertheless, in particular cases, the separately spinning cogs and gears can seem to mesh all too well. In Tulia in 1999, dozens of black residents (almost half of the adult black men in the small West Texas town) were fingered by a single undercover officer, and rounded up in a single raid—and then quickly tried and convicted by juries, or induced to plead guilty to felony drug-trafficking charges, and sentenced to lengthy prison terms, with their fates resting on procedurally constrained appeals before a

generally hostile state court. "Anyplace else, you might have a chance of getting some things undone, or at least getting another look at the cases," said a defense lawyer. "But this is Texas."[3]

Tulia serves to represent not just the surface of the larger system, but some of its complexity as well. In the spotlight of national coverage, the episode appeared as a demonstration of racist fears and obsessions maintaining a tight grip on small-town Texas justice. But while the raids and subsequent railroading of defendants reenacted grim patterns of persecution from previous decades, they were also made possible by recent institutional developments—specifically the setting up of drug enforcement "task forces" by police, sheriffs, and district attorneys in particular locales, with funding provided by a federal grant program (passed through the state governor's office) and by the task forces' own cash and asset seizures. Likewise, the stoking of public anxieties over drug crime, in political campaign rhetoric but also in executive policymaking at the state level, was an updated, technologically advanced version of an old phenomenon—the top-down mobilization of targeted sources of voting support, via coded racial symbols—reflecting a long-awaited shift in statewide partisan politics and an intensified competition for particular voting blocs.

Other factors in play ran counter to the prevailing policies and politics of state officials. Legal challenges which eventually brought the retrial and vindication of the Tulia defendants reflected the occasional intervention of *pro bono* attorneys in selected

[3] Nate Blakeslee's insightful reporting and analysis, in his *Texas Observer* articles and in *Tulia: Race, Cocaine, and Corruption in a Small Texas Town* (New York: Public Affairs, 2005), have established the leading account of the widely publicized case. Also see Jeannie Kever, "Out of Hiding," *Houston Chronicle*, 6/2/02.

cases at the appeal stage, and the occasional willingness of federal (or, for the Tulia defendants, state) appeals courts to rule against existing state policies. Like Texas criminal justice more generally, the Tulia episode reflected both tradition and modernization. The recent history of institution-building and political-coalition-forming tended to reinforce a social order rooted in the more distant past—but would not always guarantee its prevalence.

Tradition and modernization together preoccupied Texas society at the same time, during decades of disorienting change. Early in the 20th century, oil production and the birth of an energy industry began an economic shift away from the common dependence on cash crops that had confounded the southern states. Boom times during and after World War II were stimulated further by massive federal investments in military bases, aerospace, the "petrochemical corridor," and other defense-related industries. Industrialization, in-migration, and metropolitan area growth came late to Texas but with abrupt force, creating an unsettled society in cities and suburbs with shallow local roots. The impact on some of the state's longstanding social conditions was mixed but undoubtedly significant: urban and suburban development patterns reinforced separation by class and race, but at the same time, widespread public resistance to the elimination of traditional forms of racial discrimination was significantly diluted. As sections of the state and segments of its population grew less isolated from other places in other states, the picking and choosing of symbols of Texas memory subtly signaled a break in the thread of actual tradition.[4]

[4] Randolph B. Campbell observes: "When modern Texans in cities such as Houston put on their boots and Stetsons and head for the rodeo or hearken back to the days of movie westerns that portrayed their state as a

The boom accelerated during the 1970s and early '80s, as the energy-based economy ran counter to the national economic cycle and attracted businesses, capital, and population from other regions. Having recently existed as an economic colony of distant regions blessed with investment capital, Texas now appeared at the center of the Sunbelt, a term coined to refer to the shift of economic resources and power toward the region of continued vitality. This later period arguably saw a lagging cultural shift finally occur—most visibly on the metropolitan lifestyle frontier (where liquor was now for sale by the drink, and *Texas Monthly* and *D Magazine* offered serious feature journalism, while their advertisers reshaped the consumption standards of upscale subscribers). Again, the implications were mixed: the space for public debate was widened, but the distance between the perspectives of Texans across class and other divides—urban-suburban-rural, Anglo-Black-Hispanic, inside or outside the criminal justice system—was not vastly narrowed. The tensions that accompanied growth were clearly aggravated by the hard times that trailed the cyclical contraction of the energy and real estate sectors.

In the political environment fostered by economic and social development, from World War II on, concentration of power within elite circles was a constant (if not always prevalent) tendency. The most influential historical narrative of mid-20th-century Texas politics describes a near-monopoly of power maintained at the statewide level by "the Establishment"—"a loosely knit plutocracy comprised mostly of Anglo businessmen,

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land of cowboys, rustlers, and gunfighters, they are drawing on a collective memory that, although it has a basis in fact, is not the essence of Texas. The cold history of being southern is not as pleasing as the warm memory of being western." "History and Collective Memory in Texas: The Entangled Stories of the Lone Star State," in Gregg Cantrell and Elizabeth Hayes Turner, eds., *Lone Star Pasts: Memory and History in Texas* (College Station: Texas A&M Press, 2007), p. 279.

oilmen, bankers, and lawyers."[5] According to this view, corporate leaders, who in previous years had been "forced to share the Texas political limelight . . . with reform movements and self-seeking politicians," succeeded after World War II in controlling the state Democratic Party and the outcomes of gubernatorial races and legislative sessions. They imposed a fixed set of policies (a regressive tax structure weighted toward consumption and retail sales, franchise fees in place of business income taxes, low expenditures for state services, tight restrictions on labor organizing) that served their narrow interests, while upholding others ("states' rights," resistance to desegregation, outlawing the Communist Party, firing liberal university professors) that reflected the fears and prejudices common to their class. Continuously maintained though it was, this degree of control was never fully secure, and it faced some vigorous challenges from liberal candidates for statewide office. Also, while consensus might prevail on broad policy essentials among politically influential circles, struggling and bargaining between representatives of conflicting economic interests could prove intense. The individual governors who received establishment backing were capable of varying degrees of leadership in their own right, and the Legislature itself was an erratic, unruly, unreliable body of amateur lawmakers who overrepresented the rural sections and who, for all their conservatism, tended to resist central direction from any particular source. In Establishment-run Texas, the carrying of legislation and guarding of priorities shared within elite circles was an endlessly recurring biennial challenge for the state's top lobbyists.

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[5] George Norris Green, *The Establishment in Texas Politics: The Primitive Years, 1938-1957* (Norman: Univ. of Oklahoma Press, 1979), p. 17.

However effective the "loose plutocracy" actually was in dominating state politics, by the 1970s the machinery was becoming obsolete. During a period of diffusion of power, the future direction of Texas politics was up for grabs. The extension of voting rights, the redrawing of voting districts under federal court orders, the discrediting of the state's most powerful elected politicians in a banking scandal, and the various demographic and cultural shifts under way all undermined the existing system of top-down management of a pliable electorate. The opening up of tightly controlled political structures was illustrated most dramatically in Dallas, where the Citizens' Charter Association—the longtime vehicle for the virtually unchallenged dominance of local politics by a network of bank chairmen and other business leaders—simply vanished from the local scene. At the same time, the corresponding institution at the state level—the Texas Democratic Party—slipped out of the grasp of the old conservative establishment and came increasingly under the influence of its long-suffering liberal wing. As both liberal Democrats and pioneering Republicans had long foreseen, the tipping balance among Democrats created a new, competitive two-party system in state politics. With Democratic Party allegiance woven tightly into the fabric of political life throughout areas of the state that resisted rapid change, party leaders calculated that they could maintain a class-based majority coalition that included newly mobilized voters (largely minority) and inherited constituents (largely rural conservatives). But instead Republicans, long confined largely to upscale precincts in urban centers, targeted and gradually captured the mass of white conservative voters, and ultimately (with a final, corporate-funded push arranged by Tom DeLay) won control of the Legislature and all

statewide offices. With one-party dominance reestablished at the state level, the concentration of power was once again a fact of Texas political life.

The characteristic features of Texas society and politics in recent decades—rapid economic development jump-started by federal policy, broad demographic and cultural shifts, the tendency toward concentration of political power within elite circles, and the reconcentration of power as a function of partisan realignment—also characterize neighboring states, to varying extents, and serve as (extreme) examples of broader regional patterns. Together with its Sunbelt neighbors, Texas also retained traditional state institutions and other features of its less affluent Southern past, side by side with the modern and newly developed. The improvement of state services lagged behind population and economic growth (and growing needs) because of the insulated political structure and its fixed policies. While the opening up of political processes eventually created opportunities to challenge longstanding policies, the more direct route was often through litigation—as federal courts increasingly served to adjudicate claims which political systems would not yet accommodate. Criminal justice in many states became a realm reshaped by litigation, court orders, and settlement agreements. Like other Southern states, Texas had retained the plantation farms and many other customs and practices of its premodern penal heritage. Like five other Southern states (and only three non-Southern), Texas would ultimately face a comprehensive federal court order involving the totality of conditions in its prison system.[6] Comprehensive court-ordered

[6] The other states were Alabama, Arkansas, Mississippi, South Carolina, Tennessee, and (outside the s South) Alaska, Delaware, New Mexico, and Rhode Island. Statistics compiled by Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge Univ. Press, 1998), p. 41.

reforms ultimately became one more distinguishing feature of regional criminal justice, and (in the case of Texas) a crucial, if limited, impetus for modernization that countered the resistance of the political establishment.

Federal court intervention typically sought to compel state institutions to meet standards of service provision set by professional experts and certifying organizations. While judges sought authoritative guidance for their mandates, reform-minded state administrators also saw the pursuit of certification as a way of defining their own tasks and legitimizing their institutions. Texas prisons and the state juvenile confinement system were both ordered by the court to attain professional accreditation and to meet other detailed standards reflecting the state of the art in relevant fields of expertise. The key issue for district and appellate judges—with far-reaching significance for state institutions—was whether the intensive provision of treatment services to individuals in state custody, according to professional standards of care, could be construed as a minimum standard that the state could be required to provide.

Why was it left to an activist federal judge, rather than state professional organizations themselves, to try to make state institutions meet professional standards? In raising this question, the litigated reform effort opens up a broader complex of unsettled questions about professional expertise, professionals themselves, and their relationships to state institutions and political authority. The question of physician participation in the death penalty raises the same set of issues, perhaps even more acutely. The sociological and historical literature on professions offers a range of understandings of the expert and his social role. According to functionalist theory, professional

occupations distinguish themselves and legitimize their authority through such means as peer review, scientific expertise, and higher values. In this view a profession, as one synthesizing scholar helpfully puts it, is "an occupation that regulates itself through systematic, required training and collegial discipline; that has a base in technical, specialized knowledge, and that has a service rather than profit orientation, enshrined in its code of ethics."[7] Inevitably such claims, rather than describing reality, promote the shared interests of professionals—authority, autonomy, prestige, social privilege, material compensation. Also inevitably, group self-interests and political expediency can be expected to conflict with the upholding of professional values across a range of possible situations and contexts.

Over time the literature of professions has increasingly emphasized the waning of independent professional authority in contemporary society and the subjection of expertise to formerly subordinate forces. The phenomenon of the American medical profession—its unique attainment of sovereignty over health care in society, and its almost equally spectacular fall from its pedestal—has long preoccupied leading scholars and shaped their analyses of professional activity as maximizing group self-interest. The more recent prevalence of market forces over physician discretion in health care is seen as a partial consequence of the routine compromising of stated professional values by self-interested, market-oriented practitioners. Historians have drawn broadly congruent conclusions from particular case studies. Brian Balogh's study of the delegation of broad policy authority over promotion of nuclear power to scientific experts on the Atomic

[7] Paul Starr, *The Social Transformation of American Medicine* (New York: Basic Books, 1982), p. 15, identifying themes in the prior work of Talcott Parsons, Ernest Greenwood, and Morris L. Cogan.

Energy Commission emphasizes the ultimate failure of the experts to contain their internal disputes and to maintain their external standing. In a very different context, Kenneth Lipartito and Todd Pratt's authorized history of the Houston law firm of Baker & Botts portrays the influence of the powerful corporate law firm over the developing institutions of the Texas legal profession—and the firm's deep identification with the technical needs and broader interests of its corporate clients. Lipartito has subsequently crafted a broad, synthetic account of American professions during the 20th century which portrays subordination as the norm. "The years between 1950 and 1970 were the exceptional ones," he argues. "In those stable decades, professional practitioners could pretend to be above the competitive fray and free from the taint of commerce."[8]

To answer the question about Texas professionals and their distant relationship to criminal justice, it is necessary to hypothesize beyond the existing arguments about professionals in recent history. Whether or not Lipartito's case study of Baker & Botts serves well as a model for his generalizations about the 20th century, it may well help to explain the orientation and behavior of other leading professional entities and organizations in the same place. The firm's full commitment to expertise in established and emerging areas of corporate law made unquestionable sense as a business strategy, but in the context of conceivable alternatives it amounted to a revealing choice about priorities. Essentially, the most powerful law firms in the state could not afford to jeopardize their client relationships by presuming to wield their power independently. In

[8] Kenneth J. Lipartito and Paul J. Miranti, Jr., "The Professions," in Stanley I. Kutler, ed., *Encyclopedia of the United States in the Twentieth Century* (New York: Charles Scribner's Sons, 1996), Vol. 3, p. 1428. Also see Lipartito and Miranti, "Professions and Organizations in Twentieth-Century America," *Social Science Quarterly*, Vol. 79, No. 2 (June 1998), pp. 301-320.

booming cities ruled by small circles of businessmen, and in a state long governed by a "loose plutocracy" of corporate chairmen, professional power basically derived from patronage, service, and proximity to the center where actual power was concentrated.

My hypothesis is that in the long-delayed reform of criminal justice in Texas, leading doctors, lawyers, academics, and other professionals had few independent roles to play. The state lacked meaningful competition among alternative centers of political power (such as labor), and professional groups lacked politically insulated institutions (such as universities, or Ford-sized private endowments) to serve as power bases in state politics. Attending to their own immediate interests required Texas professionals to serve independently powerful patrons rather than challenging them. Broad social changes and the partisan reshuffling of state politics ultimately reinforced the limits on independent professional influence. Potential support for a broader range of policy alternatives was preempted. Organized support for legislative criminal justice reforms rarely carried significant weight in the absence of imminent crises. Reconciling Texas criminal justice institutions with modern standards of treatment and care was thus left up to the federal judiciary, working with national professional organizations and experts typically brought in from out of the state.

The lack of active support by local professionals and their statewide organizations was particularly damaging to the prospects for criminal justice reform over time. This was largely because the existing operations of the justice system already required the provision of services by members of leading professions. Beyond the obvious roles of prosecutors, defense attorneys, and judges, court cases increasingly required expert

witnesses, and both adult and juvenile correctional systems required medical and casework services as well as custodial staff. Improving these services, as well as other conditions of confinement, required not only the existence of professional standards, but also the legal and political power to impose—and enforce—standards of any kind. Even as long as court orders were upheld, enforcement was always a problem. For corrections systems newly required to provide professional services, or for other areas of state criminal justice policy, arrangements for oversight and analysis indicated the degree of independence that professionals would demand and that officials would tolerate. In a sense, the tasks of inspection, oversight, and evaluation of criminal justice reflected core responsibilities of independent professionals. The extent to which they actually perform this function may be a fair index of their independence and relative standing in a broader context.

Each of the case studies contained in the following chapters considers the issues of federal intervention and professional expertise, and their impact on policy outcomes in the realm of sentencing and corrections. Several of the chapters follow reform efforts driven by litigation in federal court—meaning mostly the U.S. Court for the Eastern District, under Judge William Wayne Justice. In separate landmark cases that continued for years, Judge Justice ordered far-reaching reforms in both adult prisons and "state schools" housing juvenile delinquents. My examination of the comprehensive prison reform case focuses on one key issue of professional service provision—medical care for Texas prisoners. The ingrown, primitive customs of care offer an outrageous example of official neglect and the abasement of professional standards. While the court's remedial

orders could address the worst conditions, I argue that its failure to force the state to limit the prison population ultimately confounded its intentions. The takeover of prison health care by state medical schools, without independent oversight, reflected the institutional priorities and political power of the academic medical establishment and raised barriers to the visibility of care that had been taken down nearly a generation before.

Another ruling by Judge Justice (six years before the ruling on prison reform) was aimed at transforming the juvenile justice system. To a greater degree than the prison farms and units for adults, the reform schools were always ostensibly intended to provide rehabilitation as well as confinement, and over time the state created a façade of professionalism to conceal the actual conditions of imprisonment. The case in Judge Justice's court exposed these conditions, and his ruling sought to force the system to abandon its facilities and reorient itself according to what were then considered advanced concepts among professionals in the field. These instructions were voided when the appeals court reversed Judge Justice's ruling and remanded the case to the court for retrial. While the case did ultimately yield a settlement which included a period of evaluation and oversight by outside experts, the failure over time to limit the flow of youths into the system overwhelmed the attempted reforms and forced an expansion of the system, together with various symbols and rituals of regimentation. Once again a façade of professionalism settled over the state system (until new shocking revelations in the spring of 2007 confirmed the long-term cyclical pattern).

The story of nonjudicial federal intervention in state criminal justice contains another case of unintended consequences, while shedding light on the use of criminal

justice politics by state governors to advance personal and partisan interests. Federal grants for state and local criminal justice were originally envisioned as a means of elevating the skills and professional status of law enforcement personnel (as part of the Johnson White House's too-little, too-late effort to cope with crime in the streets). In reality, the transformation of the actual program into a block grant allowed state governors to practice a new form of criminal justice patronage politics. But in the hands of a clever, ambitious executive, the money could be put to more meaningful use. My chapter shows how federal grant funds helped fuel a popular antidrug crusade and mobilized an influential new public constituency for draconian drug laws.

The fate of successive sentencing reform initiatives in the Texas Legislature reflects both the cultivation of actual professional expertise—data collection, analysis, and projection of prison population trends—at the state level, and the failure of experts to make more than a modest impact on legislative outcomes. The state penal code enacted in 1973 reflected progressive intentions among leaders of the legal profession, but the fight over enactment also displayed the intraprofessional divisions that disabled the State Bar as a force for political change. Years later, dire problems of prison population management forced state leaders to set up a staff of data analysts and, ultimately, a full-blown special commission charged with recommending comprehensive sentencing reforms. Both initiatives raised the possibility of bringing credible professional expertise to bear on the legislative management of criminal justice as a matter of course. But in the end, the difficulties of sustaining such a role were reconfirmed.

The last chapter addresses the sorest subject in Texas criminal justice. The revival of the death penalty came accompanied—and to some degree further legitimized—by rituals of medical procedure (execution by lethal injection) and sentencing criteria that included psychiatric diagnosis. This latest innovation—together with its passive acceptance by organized medicine—proves well suited to a direct comparison across international boundaries. In England, many of the same developments that later characterized capital punishment in Texas were anticipated and debated. What stood in the way of recommendations which might have helped sustain the death penalty was the British Medical Association, which objected both to the rules determining the criminal responsibility of defendants and to proposed procedures for execution by lethal injection. The comparison raises new questions about the social standing and perceived jurisdictional responsibilities of leading professions under political pressure. In places such as England, doctors asserted a professional interest in criminal justice policies and preempted the medicalization of capital punishment.

But this was Texas, where no such responsibilities prevailed. The theme of regionally distinct patterns of professional formation and evolution forges a new link between overlapping genres of regional history—the history of Texas, the Sunbelt, and the broader history of the South, with its richly varied themes of regional distinctiveness—and the literature on professions and their development. As for the state itself, my inquiry into changes in criminal justice seeks to shed new light on its recent history and to relate it to a broader context. Ultimately the fate of each of the initiatives—federal grant funding, reform of adult prisons and juvenile institutions, and

the state criminal justice policy analysis staff—reflected the pressures tending against the creation and maintenance of independent professional authority in Texas.

Chapter 1

Wards of the State: The Politics of Texas Prison Medicine

The history of prison medicine reflects both the evolution of the medical profession and the strange career of prison reform. In some ways prison medicine, like prisons generally, has resisted the reforming efforts of litigants for more than a generation. Early on in these efforts, primitive conditions of care in many state systems offered clear opportunities to inmates, advocates and federal judges seeking to establish new Eighth Amendment standards. In Alabama, Judge Frank Johnson's ruling in a medical-care suit paved the way for further interventions by asserting federal court oversight over the entire state prison system and ordering relief to a whole class of prisoner-plaintiffs.[1] Cases in other states cited medical care among other conditions which together required comprehensive injunctions.[2]

Prodded by court orders and guided by the development of formal standards, state and local governments vastly increased their spending on inmate health care from pre-litigation levels, but the quality of the care being provided has still been bitterly contested. In the 1990s, the resort to managed care offered by private contractors renewed debates over whether inmates were being deprived of adequate or competent

[1] *Newman v. Alabama*, 349 F. Supp. 278a (M.D. Ala. 1972). See Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (New York: Oxford Univ. Press, 1989), chapter 2, especially pp. 30-41.

[2] Early examples include the Arkansas and Mississippi suits. See J. Smith Henley's ruling in *Holt v. Sarver* (*Holt II*) 309 F. Supp. 362, 365 (E. D. Ark. 1970), and Judge William C. Keady's opinion in *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972). Claims of inadequate provision or lack of access to medical care were part of all the totality-of-conditions claims.

care.[3] In California, where litigation continues to this day, a federal judge in October 2005 actually took the administration of prison health care out of the hands of the state corrections department and placed it with a court-appointed receiver.[4] The persistence of the issue reflects the tendency of penal reform to chase a receding horizon.

The same tendency could be attributed to the advance of medicine itself, given the similarly stubborn divergence between ever more costly investments in new technologies of care and the actual state of people's health. To the extent that the reform movement reduced the legal isolation of inmates from the free world, it exposed them more to forces broadly affecting free-world society, including the inflation of health-care costs and the rise of managed care as a means of cost control. But as outside forces shaped the development of medical care within prisons, this same development proved to have an impact of its own beyond prison walls. The flow of funds into new systems of inmate care supported the emergence of correctional health care as a field, a new specialty within medicine and allied professions, with its own professional organizations (such as the National Commission on Correctional Health Care) offering accreditation to correctional institutions and promoting new career opportunities for doctors, nurses, technicians, and others. To a medical profession with declining power over patient care in an

[3] A vivid recent example was provided by Paul von Zielbauer's *New York Times* series titled "Harsh Medicine," which investigated the cost-trimming practices of industry-leading contractor Prison Health Services, Inc., and their impact on the New York City jail system and on many of the company's other clients. See "As Health Care in Jails Goes Private, 10 Days Can Be a Harsh Sentence," *NYT*, 2/27/05, and "In City's Jails, Missed Signals Open Way to Season of Suicides," *NYT*, 2/28/05. Von Zielbauer also followed Prison Health Services to Alabama and found some of the same types of abuses. See "One Doctor's Diagnosis," *NYT*, 8/1/05.

[4] See *Plata v. Davis*, No. C-01-1351 TEH, 2005 U.S. Dist. LEXIS 43796 (N.D. Calif. 2005), Findings of Fact and Conclusions of Law Re Appointment of Receiver.

environment dominated by cost concerns, the expansion of prison populations with constitutional protections offered a significant growth opportunity.

The peculiar case of prison health care in Texas reflects at once the state's characteristically Southern penal heritage, its own distinctive pattern of response to pressures for change, and, not least, the position of the organized medical profession as an increasingly interested party. By the early 1970s, the state of medical care (among other conditions) within Texas prisons had become virtually invisible to the outside world, shielded not (as in other Southern states) by rustic traditions but by an administration bent on controlling what it viewed as model institutions. Over many years of maneuvering over *Ruiz v. Estelle*, the federal case Texas prisons, state officials fiercely defended their control over all areas of prison management. On medical care, they persisted through the trial stage in defending the constitutionality of the indefensible. In responding to the court's demands for comprehensive reforms, prison administrators agreed to settle the medical-care issues rather than including them in ongoing appeals, but in implementing court orders they still tried to pursue modernization on their own terms.

As with his handling of juvenile confinement in *Morales v. Turman*, Judge William Wayne Justice tried to use the *Ruiz* case to reorient the prison system in ways which would not survive the appeals process. The provisions of his order granting relief from overcrowding, which the Fifth Circuit overturned, suggest an underlying purpose of forcing Texas to accept a smaller prison population which could be better served. As with juvenile confinement, only on a vastly larger scale, the state's failure to limit the flow of convicts into the prison system ultimately meant that all other intended effects of

the litigation were severely compromised. Later decisions to add institutional capacity left the state obliged to provide expensive (if not necessarily sufficient) medical services to a vastly increased population. State medical school administrators adeptly used this situation to promote their professional and institutional interests, securing control over managed-care provision without any oversight. Some twenty years after the scandalous state of prison medicine in Texas was brought to public attention, the system was effectively brought back behind legal barriers, isolated from the free world once again.

Behind the old brick walls guarding the original Texas penitentiary (now called the "Walls Unit") in Huntsville, abutting one wing of a 19th-century structure containing cell blocks, the Huntsville Unit Hospital building stands five stories high, rising well above the surrounding complex. Built in the early 1930s, the structure reflects an intermittent concern for inmate welfare on the part of past generations of prison managers, political leaders, and reform advocates—a heritage rarely invoked by the Texas Department of Corrections by the 1960s and 1970s, as it promoted its own image as a force for modernization and Texas-style progress.[5] But during the years of the Texas

[5] Paul M. Lucko recaptures the aspirations and initiatives of a forgotten generation of reformers—as well as their lack of sufficient power to uproot the prison farm system—in "A Missed Opportunity: Texas Prison Reform during the Dan Moody Administration, 1927-1931," *Southwestern Historical Quarterly* 96 (July 1992), pp. 27-52. In their history of recent Texas prison litigation, Steve J. Martin and Sheldon Ekland-Olson devote a chapter to background on the earlier history of the prison system, attributing the hospital to the improving initiatives of prison manager Lee Simmons. See *Texas Prisons: The Walls Came Tumbling Down* (Austin: Texas Monthly Press, 1987), p. 12, and also Simmons, *Assignment Huntsville: The Memoirs of a Texas Prison Official* (Austin: Univ. of Texas Press, 1957). (Lucko however documents Simmons' determination to exercise managerial, paternalistic authority, over the objections of prison reform advocates. See "Counteracting Reform: Lee Simmons and the Texas Prison System, 1930-1935," *East Texas Historical Journal*, Vol. 30, No. 2 (1992), pp. 19-29.) Unfortunately, as of 2007 the leading scholarly histories of the Texas prison system, both of which also credit the efforts of reformers while demonstrating their limits, end their coverage with the abolition of convict lease. See Lucko, *Prison Farms, Walls, and Society: Punishment and Politics in Texas, 1848-1910* (Ph.D. dissertation, The

prison lawsuit, the hospital came to symbolize something else. By then obsolescent and dilapidated, the building conspicuously embodied the state of the medical care being provided in its wards and in the prison system generally. The extraordinary efforts required to get its hospital functions closed down reflect the ways in which Texas prison managers confronted a changing legal and social environment. The traditional provision of medical care was integral, if not necessarily indispensable, to the "control model" of Texas prison governance. Reform of medical care, like other changes, required the demise of the old regime and a transition to new prison leadership.

The "control model" involved an emphasis on orderliness, intensive regimentation, and charismatic authority that successive Texas prison system directors adapted and refined. The original model was Joe Ragen's "authoritarian regime" at Stateville, Illinois, which served to advertise the strengths (and ultimately the failings) of personalized leadership.[6] Ragen maintained order at Stateville through a system of patriarchal dominance that tolerated no challenges and required that the separation of prison from outside society be rigorously maintained. Marched in silent lines, subjected to unrelenting regulation of their behavior and movements, prisoners (supposedly) reaped the benefits of a secure environment and the various progressive programs that it allowed. As director of the Texas Department of Corrections from 1962 to 1972, George Beto, a close friend and admirer of Ragen, consciously adapted basic principles from the

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University of Texas at Austin, 1999), and Robert Reps Parkinson, *The Birth of the Texas Prison Empire, 1865-1915* (Ph.D. dissertation, Yale University, 2001). As an example of boosterism and the selective use of institutional history to promote the then-current regime, see *Texas Department of Corrections: 30 Years of Progress* (Huntsville, 1977).

[6] See Joseph E. Ragen and Charles Finston, *Inside the World's Toughest Prison* (Springfield, Ill.: C.C. Thomas, 1962). As a classic work, James B. Jacobs' *Stateville: The Penitentiary in Mass Society* (Univ. of Chicago Press, 1977) remains indispensable to an understanding of prison regime types, and processes of change, in Illinois and elsewhere.

Stateville penitentiary to the prison farms.[7] Beto's predecessor, O. B. Ellis, had renovated a rundown, discredited system, managed farm operations efficiently, obtained funds for new housing and industries, and rebuilt the system's public standing. Beto built upon Ellis' achievements largely through the force of the persona he cultivated. "Walking George" strode unannounced through cellblocks and fields, remembering inmates by name and commanding their deference, as well as that of prison staff. A strong subculture among guards, emphasizing hierarchical loyalty and bolstered by Beto's example, passed on customary methods of intimidating inmates into submission.[8]

Orderliness, cleanliness, and a low level of reported violence made Beto's prisons the object of nostalgia in later years, even among well-informed observers.[9] But the regimes of Ellis and Beto, like the efforts of their predecessors, were limited and shaped by fundamental characteristics of the Texas system: long prison sentences, large state landholdings, low state appropriations, very low ratios of guards to prisoners, and the widespread public assumption that the prison should support itself. Under these circumstances, the actual control of inmates had long been exercised in large part by other inmates. "Building tenders" (originally a term for janitors), favored with official

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[7] The Beto-Ragen relationship is usefully illuminated in David M. Horton and George R. Nielsen, *Walking George: The Life of George John Beto and the Rise of the Modern Texas Prison System* (Denton: Univ. of North Texas Press, 2005). All published sources on Beto's leadership credit Ragen's influence. Martin and Ekland-Olson go so far as to say that Beto's administration "was but a replication of Ragen's Stateville," likening the Texas building-tender system to Ragen's use of problem-case inmates as trusties. The comparison seems not to acknowledge the fundamental differences between a Northern penitentiary like Stateville and the sprawling array of Southern-style prison plantations which mostly comprised Beto's domain in Texas.

[8] An invaluable analysis of the guards' subculture is provided in chapter 3 of Ben Crouch and James W. Marquart, *An Appeal to Justice: Litigated Reform of Texas Prisons* (Austin: University of Texas Press, 1989).

[9] Dick J. Reavis issued a prominent call for a return to old-style penal ways in "How They Ruined Our Prisons," *Texas Monthly*, May 1985. A more serious and influential—yet almost equally uncritical—defense of Beto's regime is contained in John J. DiIulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* (New York: The Free Press, 1987).

responsibilities as trusties, functioned unofficially as cellblock bosses according to traditions that went back for decades.[10] Ellis and Beto both tacitly accepted the custom, relying upon building tenders for information about other inmates, and allowing their turf claims as part of the overall scheme of order maintenance at low cost to the state. Behind the façade of order, under strict but supposedly secure conditions, individual prisoners were often actually at the mercy of elite fellow prisoners.

Especially given the secret of its success, the regime of control demanded that the prison be kept isolated from the world outside. Part of the task was political, a matter of protecting the system from the interference or control of other parties. For Ellis and Beto, the main purpose of political networking and of promoting their own reputations as managers was to maintain their autonomy as decision-makers. This was sometimes put in traditionally Progressive terms of keeping party politics and patronage out of prison business. In claiming to be reformers as well as hard-nosed managers, the TDC directors seem to have sought to preempt any revival of the organized reform efforts of previous decades.[11] Another part of the task, however, was to preempt legal penetration of the

[10] Given the state's determination to hide its actual workings, the building-tender system has understandably received limited scholarly attention. In chapter 4 of *An Appeal to Justice*, Crouch and Marquart provide a careful description. Ethan Blue's comparative study of the experiences of Texas and California inmates finds painfully vivid evidence of the sexualized violence that permeated what was ostensibly a system of order maintenance. See "Hard Time in the New Deal: Racial Formation and the Cultures of Punishment in Texas and California in the 1930s" (Ph.D. dissertation, The University of Texas at Austin, 2004), chapter 4.

[11] Progressive clubwomen, academics, ministers, and other civic leaders had organized in the 1920s in groups such as the Texas Committee on Prisons and Prison Labor. See Lucko, "A Missed Opportunity." As late as 1948 the Texas State Council of Methodist Women rallied church members to press the state prison board to adopt reforms (which included the appointment of Ellis), according to Martin and Ekland-Olson, *Texas Prisons*, pp. 18-19. The fading out of early 20th-century Progressive politics in Texas, and the political reorientation of postwar civic elites, could use more direct attention, although the literature on Texas politics and Southern progressivism suggests plenty of likely factors (such as the New Deal shift of reformist energy to centralized national policymaking, anti-New Deal backlash, oil money, racial politics, and broad demographic change spurred in part by federal funds).

prison system arising from the inmates' own efforts. Again following Ragen's example, Beto banned the possession of legal materials (including attorneys' correspondence), censored all mail to and from inmates, and made sure that inmates who made legal claims against the prison suffered retaliation. But in the legal climate of the late 1960s and early 1970s, these restrictions actually came to invite challenges that they were intended to prevent. The writ-writers' circle that included Fred Cruz, Guadalupe Guajardo, Jr., and David Ruiz, who filed *habeas corpus* writs and lawsuits challenging the conditions of their confinement, was separated from the general population and made to perform extra field labor (becoming known as the "eight-hoe squad"). Issues of medical care—poor quality, lack of access—accounted for a large part of the rising flow of complaints and petitions.[12]

Neglect of medical care may not follow from the theory of the control model, but, like the persistence of the building-tender system and other traditions, it demonstrates how Beto's self-proclaimed model system was actually a creature of its own peculiar institutions. Like other Southern penal farm systems, Texas prisons carried on conditions of labor that dated back to the heyday of convict lease, which the substitution of state for private management had done little to transform. Amid clouds of lint in a TDC textile mill, one inmate worker quoted in a late-1970s magazine article summed up the experience of prison labor by whispering: "Slavery, man. Human slavery. You write that down. That's all you need to write, because that puts it all in one word."[13] As long

[12] Judge Justice later explained that he and his clerks separated the prisoner complaints they received into four main categories: brutality, lack of medical care, overcrowding, and summary discipline. See William Wayne Justice, "The Origins of *Ruiz v. Estelle*," *Stanford Law Review*, Vol. 43, No. 1 (Nov. 1990).
[13] Quoted in Kevin Krajick, "Profile: Texas," *Corrections Magazine*, Vol. 4, No. 1 (March 1978).

as the voices of inmates remained largely suppressed by traditional and modern means of control, the provision of benefits like medical care would depend only upon the needs of the system's managers for maximum security and labor productivity. Keeping inmates under tight control and prisons isolated from the outside world reduced the incentives for TDC to invest in improvements which would have been more visibly in demand under a less constrained regime.

While inmate complaints began to illuminate the actual conditions of medical care, it took the beginning of formal investigations in the mid-1970s to make visible the overall state of the system. In an exceptional case of progressive initiative on the part of leaders of both chambers, the Texas Legislature in 1973 appointed a joint study committee on prison reform. With inmate lawsuits attracting growing publicity and stimulating public concerns about TDC, the Legislature charged the committee with investigating the prisons as well as proposing changes.

John Albach, a young attorney and criminal-justice researcher, was the staff member who drafted the committee's working report on medical services. Albach went to great lengths to couch unsparing observations in constructive ways. He generously granted that the health care system at TDC aspired to offer treatment comparable to what the free world offered, and that it intended to provide all the necessary staffing and facilities. But "one need only talk to the medical staff at TDC to learn that the existing health care system falls far short of the intended system. In fact, everyone we have talked

to agrees that the present level of medical care in TDC is inadequate. Only TDC's official statements contend that the system is adequate."[14]

Some inmates requiring major medical care were treated at John Sealy Hospital in Galveston by the University of Texas Medical Branch, under an arrangement with the medical school going back to the 1920s. But most inmates were hospitalized at the Huntsville Unit Hospital, which Albach reviewed in detail. Despite the degree of dissatisfaction on the part of TDC medical staff that Albach acknowledges, his description of the hospital conveys a sense of a place whose residents have grown used to conditions that would shock visitors from outside. "This building is old, poorly maintained, unsafe, and unhealthful," he reported. "The hospital is in no way adequately equipped to meet the medical needs of 17,000 TDC inmates. The hospital is considerably below any minimum certification standards."[15]

Albach's report included the findings of an evaluation by Texas Hospital Association staff which TDC itself commissioned, apparently after the facility lost an accreditation from the agency that it had somehow maintained. For the THA evaluators and Albach's own staffers, the flouting of safety standards seemed especially flagrant. Obsolete design was part of the problem: the building had exactly one exit—the front door—and its upper floors were reached by a narrow stairwell and a single elevator. But no emergency evacuation plans even existed. The elevator often broke down and was locked at night anyway. "When a security guard was asked what would happen if a fire

[14] "Medical Services Working Paper," p. 10, Records of the Joint Committee on Prison Reform, unmarked folder, Box 1980/20-31, Archives and Information Services Division, Texas State Library and Archives Commission.
[15] "Medical Services Working Paper," p. 12.

occurred, he answered, 'It would be a disaster.'"[16] The building was crisscrossed by ungrounded electrical equipment cords and had no plans for safe storage of dangerous materials. Less dire but still significant hazards were created by visibly shoddy housekeeping, aging fixtures and cracking floors, unsanitary kitchen and bathroom conditions, and overcrowded patient wards with insufficient bathroom facilities.

For all the obvious problems of the physical plant, the personnel and staffing issues were arguably worse for patients and more emblematic of the character of the system. As of the drafting of Albach's report in mid-1974, Dr. Ralph Gray was the only full-time physician employed by TDC. His duties consisted merely of the following:

> (1) director of all of TDC's medical services, (2) chief physician for the "Walls" hospital, (3) examining physician for all inmates entering TDC at the Diagnostic unit (this requires that Dr. Gray go to the Diagnostic unit five afternoons each week), (4) physician making rounds and having primary responsibility for inmates at the Wynne and Ellis units, and (5) physician on-call to examine inmates within northern units who have died.[17]

Other prisons ("units" in TDC lexicon) were scheduled to be visited once a week by physicians with private practices who worked for TDC part time. Earlier that year, Dr. Gray had had three full-time physicians on his staff, but they had all quit because TDC could not pay them sufficient salaries. "At its present level of staffing," Albach concluded, "TDC falls tragically below minimum prerequisites." Applying guidelines from the American Correctional Association's *Manual of Correctional Standards*, Albach figured that TDC required no fewer than twenty full-time physicians.

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[16] "Medical Services Working Paper," p. 14.
[17] "Medical Services Working Paper," p. 20.

Most of the treatment of inmates was provided by medical assistants, a majority of whom had been trained in the military as medical corpsmen.[18] Medical assistants staffed the unit infirmaries, held sick call at each of the units, and decided whether inmates should receive a particular treatment, should be referred to a physician, or were simply malingering. (Albach noted that a leading complaint among inmate petitions was denial of care by medical assistants who refused to believe that an inmate was sick.) No formal training was provided for medical assistants, who were expected, like the guards, to learn on the job after being hired. In the absence of physicians, Albach made clear that medical assistants were being used to carry out tasks well beyond their qualifications.

If the medical assistants performed most of the doctoring, all of the other functions—orderlies, nurses, technicians, clerical staff—were actually filled by inmates. The language of Albach's report suggests that he unexpectedly came to the realization that the Huntsville Unit Hospital was not what it seemed on the outside—that it was a facility run on inmate labor. He was familiar with secondhand accounts of the extent of the inmates' responsibilities, but skeptical:

> When we first visited the "Walls" hospital, we were dubious of the claims made by inmates in their letters that inmates served as "doctors." These inmate "doctors" are not licensed physicians who have found themselves in prison, but rather inmates who have learned certain medical techniques by seeing and doing.[19]

Albach's description of what he witnessed for himself conveys a sense of the surreal. He observed the routine performance of a range of skilled tasks by inmates whose only

[18] "Medical Services Working Paper," p. 24.
[19] "Medical Services Working Paper," p. 25.

qualifications were their own experience. Prisoners acted as X-ray and lab technicians, and "their work product, from all accounts, appears to be good," but they were left to do the work without training or supervision.[20] All nursing care in the prisons was provided by inmate nurses, who also received no training other than watching each other work. In addition to the professional functions of registered and licensed vocational nurses, inmate nurses provided emergency medical treatment at night, when the hospital was left in their charge.

Albach then reported that the tales of inmate "doctors" were all too well rooted in actual practice:

> Most disturbing is the fact that inmates at TDC perform surgery on other inmates. On one visit to the "Walls" hospital, we went into the operating room and watched an inmate perform minor surgery on another inmate, after another inmate had given the patient an anesthetic. This procedure involved giving a local anesthetic, making an incision, removing a steel suture, and then sewing up the incision. All of this procedure was performed by inmates without a physician being present. After observing the operation, we asked a TDC physician about the use of inmates as surgeons. The doctor praised the skill of these inmate surgeons. We were told that most simple surgery in the hospital was performed by inmates without a doctor being present in the operating room. . . . The TDC doctor informed us that inmates requiring minor surgery were told that it could be done by an inmate "surgeon" promptly or that they would be put on the list to be attended by a real doctor weeks or months later.[21]

The most complicated surgery performed by the inmate surgeons, according to the TDC doctor, was repair of Achilles tendons (a prison specialty, reflecting a tradition of self-mutilation among inmates seeking to avoid field work). In such cases, a doctor might be available to assist. Albach consulted a private surgeon who "stated that he would not

[20] "Medical Services Working Paper," p. 26.
[21] "Medical Services Working Paper," pp. 26-27.

even attempt such surgery himself, but would refer it to a specialist."[22] The work of the inmate surgeons appeared to Albach to be highly valued by the prisoners themselves. The discovery of the role shed some light on the hierarchy of an inmate society in which experienced hospital workers commanded special prestige. Many inmates, Albach observed, "point to inmate medical personnel who have reputations as skilled and knowledgeable persons as examples that inmates can be productive. However, some inmates do express sincere doubts as to the medical competency of these untrained inmates."[23]

In cases such as Albach's exposure of the state of medicine at the Huntsville Unit Hospital, the institutional conditions and practices that he evaluated with reference to recently drafted professional standards seemed a very plausible proxy for a more essential concern, which was the effectiveness of treatment in terms of outcomes. The two issues—compliance with standards and the actual quality of treatment—would never be the same, however, and in this sense Albach's report illustrates a dilemma of health care that would persist in later years as prison health care was modernized. Another way of trying to get at the question of quality of care was to study the outcomes themselves—especially particular kinds of outcomes such as deaths of patients under care. Inmate deaths were all the more significant, Albach observed, because of the responses they elicited. The legislative committee on prison reform had "received many allegations of deaths as a result of inadequate medical care from both inmates and employees. Unfortunately, the Joint Committee staff does not have the competence or relevant data to

[22] "Medical Services Working Paper," p. 27.
[23] "Medical Services Working Paper," p. 27.

properly check these allegations." The absence of autopsy reports (which TDC was not authorized to pay for) or other official information on the causes of deaths smacked of secretiveness, fostering rumors which invariably swept through the inmate population. Albach could only conclude that rules for postmortem inquiries should be developed and that "the apparent invisibility of non-routine deaths in prison needs to be corrected."[24]

One particular letter to the legislative committee staff vividly suggests the effect of patient deaths on fellow inmates. Darral R. Lovett was an inmate at the Walls Unit who Albach met during a visit to the Huntsville Unit Hospital, and who evidently felt compelled to send details to the committee of cases he had mentioned in the meeting. His letter describes the deaths of four hospital patients. One was treated at the hospital for pneumonia, and was returned to his unit despite a lack of improvement: "The story goes that he was transferred back to the Wynne farm before his x-ray report had been read. He was back within a week with two full lungs. He died a short time later." Another inmate, Roy Wright, suffered and died from what was listed as a pulmonary embolism but was given no pain medication. He was, however, transferred to an isolation cell because of his loud complaints. "We civilized people provide better for our household pets," Lovett observed. "But Wright wasn't a pet, he was a convict." One other inmate, Charles Boyd, a building tender, died of a fatal dose of Demerol administered after gall bladder surgery while his vital signs were weak:

> Charlie died of incompetence. I didn't mourn his death because of the misery other convicts had suffered because of him. He had [a] right to live though. He was just another frightened human being, making it the best way he knew how. Even if it was the wrong way, it was the way officials here want it to be.

[24] "Medical Services Working Paper," pp. 41-42.

> I have mixed emotions about this letter. On one hand, I know that I may suffer for what I'm telling you. On the other, if people don't tell about the things going on here, we may never see any change. God knows, we need some.
>
> People here are very reluctant to help the committee and for good reasons. It isn't a bad place to do time, if you have got time to do. What they don't realize is that it could be them over there in that hospital, very ill, and having to depend [on] the medical aid available. And not being able to do one goddam thing about it. We're wards of the state, and the state really couldn't care one way or the other if we live or died. Freaks me out to think I might get sick while I'm here.[25]

Albach's working paper and recommendations for improvements formed the basis for the section of the legislative committee's formal report, which was published in December 1974 (shortly before the next Legislature convened). The committee's curious treatment of Albach's revelations suggests its view of the politics surrounding its work.[26] Albach's recommendations regarding inmate labor, that inmates "should not be used in professional capacities for which they have not received formal training and certification," and specifically that "the practice of using inmates as RN's, surgical assistants, and surgeons should be ended immediately," were included in the list of formal recommendations by the committee. But the narrative section on medical care omitted any reference to inmate surgeons, observing only that inmates provided "all nursing capabilities" and held unofficial responsibilities for "administering medication

[25] Letter, Darral R. Lovett, TDC #225209, to John Albach, Joint Committee on Prison Reform, April 4, 1974, Records of the Joint Committee on Prison Reform, unmarked folder, Box 1980/20-31, Archives and Information Services Division, Texas State Library and Archives Commission.

[26] Chet Brooks, the respected state senator who had proposed the committee and served as its chair, clearly hoped to shepherd proposals that would be broadly acceptable to legislators in the 1975 general session, as did a number of fellow committee members known for their liberalism (including Mickey Leland and Lloyd Doggett among others). But, as Martin and Ekland-Olson observe, one of the committee members refused to sign the report and publicly denounced the committee's citizens advisory panel as "the most grotesque collection of radical activists ever put together under one roof." See *Texas Prisons*, p. 78. Martin and Ekland-Olson emphasize the committee's "forceful findings" on medical care but miss the omission of Albach's narrative on inmate surgeons.

and injections."[27] The narrative section and the recommendations did emphasize the deficiencies of the Huntsville Unit Hospital and the "glaring need for more doctors and trained medical personnel."[28]

If the committee members doubted the political appeal of their recommendations, the Legislature lived up to their doubts. The burying of prison reform legislation was generally credited to Beto's hand-picked successor as director of TDC, W. J. "Jim" Estelle, who was proving to be an effective advocate and an uncompromising defender of institutional traditions in his own right. As with juvenile justice reform, the collapse of legislative efforts left Texas prison reform largely in the hands of federal courts. One case which was appealed to the U.S. Supreme Court, *Gamble v. Estelle*, yielded the standard that has been invoked and applied ever since in rulings on prison medical care. J. W. Gamble, an inmate at the Walls Unit, was unloading a truck at the prison textile mill on November 9, 1973, when he was caught partially in the path of a falling 600-pound cotton bale and hurt his lower back. His complaint alleged that he was given nothing but pain pills, and was punished with solitary confinement for refusing to go back to work, despite his constant pain, "blackouts," and high blood pressure. The federal district judge's dismissal of Gamble's suit was reversed by the Fifth Appeals Court, which ruled that Gamble had an actionable claim.[29] The appeal brought by the state of Texas before the Supreme Court, *Estelle v. Gamble*, elicited the opinion that set the new standard. Justice Thurgood Marshall, writing the opinion for the majority that

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[27] *Final Report of the Joint Committee on Prison Reform, 63rd Legislature*, December 1974, p. 55. The report also credited medical assistants and inmate nurses with providing "what seems to be adequate paramedical assistance" while noting that this amounted to no substitute for physicians. See p. 56.
[28] *Final Report*, p. 56.
[29] *Gamble v. Estelle*, 516 F.2d 937 (CA.5 (Tex.) 1975).

reversed the appeals court, appears to have tried to justify the reversal while still crafting a robust standard of protection under the Eighth Amendment.[30] Marshall argued that what Gamble had was a tort claim rather than an Eighth Amendment case. But "deliberate indifference to serious medical needs of prisoners" was constitutionally forbidden and represented valid cause for action.[31]

TDC would not have to wait to be challenged under the new standard. In 1974, Judge Justice, who as a known liberal received more than his share of prisoner petitions, selected and consolidated eight of them—including a rambling set of complaints by inmate David Ruiz—into a single case. Having presided over traditionally unequal court contests between semiliterate complainants and the TDC's attorneys, Justice acted on his longstanding desire to set up a fair fight. Using his powers to the limit, he selected the lead counsel for the inmates (prominent prisoners' rights attorney William Bennett Turner) and, as in *Morales*, ordered the U.S. Justice Department to serve as *amicus curiae* and investigate the inmates' complaints. "It was not my business to be an advocate," the judge later asserted. "But it was emphatically my business to find an advocate, because the truth could not have been ascertained without one."[32] Specifically Judge Justice wanted the truth about four key issues of complaint, one of which was medical care. (The others were overcrowding, summary discipline, and brutality, the last of which raised the issue of the building tenders.)

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[30] *Estelle v. Gamble*, 429 U.S. 97 (1976). Despite the importance of the "deliberate indifference" standard for all subsequent litigation on prison medical care, the literature on the formulation of Justice Marshall's opinion itself is thin. Melvin Gutterman, "The Prison Jurisprudence of Justice Thurgood Marshall," *Maryland Law Review*, Vol. 56 (1997), provides some commentary at pp. 174-175.

[31] *Estelle v. Gamble*, at p. 104.

[32] Justice, "The Origins of *Ruiz v. Estelle*," p. 11. My explanation of the origins of the suit is based mainly on Justice's account.

Led by Estelle and joined by the Texas attorney general's office, TDC fought back against the court as well as the plaintiffs. What Justice saw as the creation of a level playing field impressed state officials as an illegitimate attempt to railroad a preconceived verdict through the court. Assistant Attorney General Ed Idar, Jr., who served as lead defense counsel, made a point of objecting to Justice's rulings, routine and otherwise. "I think he had expected us just to fold over as they did in the *Morales* case," Idar explained later.[33] He and the other state's attorneys appealed the order bringing the Justice Department into the case, challenged the authority of federal investigators, demanded a change of venue out of Judge Justice's district court, and pressed miscellaneous other matters upon the Fifth Circuit Court of Appeals. With the appellate judges generally supporting Justice's rulings, the state's efforts mainly had the effect of delaying the beginning of the trial for several years, until October 1978.

The delay affected the case in several ways. The *Estelle v. Gamble* ruling was handed down during the *Ruiz* preliminaries, creating the "deliberate indifference" standard which from then on would determine the shape of the case against TDC's provision of medical care. At least initially, the state's attorneys had an interest in holding out for the possibility of a favorable outcome in the *Gamble* case, or at least a restrictive standard which might then bind the *Ruiz* court. But they appear to have had another, continuing interest in stretching out the proceedings. TDC and other state officials appear to have viewed medical care issues as the area where they were most vulnerable, presumably considering the burden of trying to defend conditions like the

[33] Quoted by Frank Kemerer in *William Wayne Justice: A Judicial Biography* (Austin: University of Texas Press, 1991), p. 354.

ones John Albach had exposed. Having fended off the immediate threat of the joint legislative committee, TDC had belatedly begun pressing the Legislature for substantial budget increases for medical care and, in 1976, for a new prison hospital (to be built, preferably, on the grounds of one of its existing units). The Legislature in 1977 approved building the new facility at Galveston, where the medical school already provided some inmate hospital treatment. In his opening arguments at the trial, Idar acknowledged that prison medical care had been deficient as of 1974, when proceedings in the case had first begun, but argued that TDC was rapidly improving its services and had already solved the most significant problems. The state further amplified this point in its post-trial brief, by which time construction on the Galveston hospital had advanced further: "Within two years, TDC will have a medical care system that will meet or exceed any professional or constitutional standard. It will provide better care than that available to most Americans and will be without peer among prison medical care systems."[34]

In one other important sense, however, the delay worked very much against the state's interests. State population growth, rising crime rates, and local enforcement and sentencing patterns all helped launch what would be a drastic and sustained expansion of the inmate population, beyond what could be accommodated within any of TDC's existing facility expansion plans. From 15,000 in 1972 the population rose to 25,000 by the time of the trial opening.[35] The plaintiffs' original case against the state on grounds of prison overcrowding was only made more urgent and compelling with every passing day of continued litigation. The need to accommodate the flow of commitments, which

[34] *Ruiz v. Estelle,* 503 F.Supp. 1265 (S.D. Tex. 1980) (henceforth *Ruiz*), Defendant's Post Trial Brief, p. 79.
[35] TDC annual report statistics cited in Martin and Ekland-Olson, *Texas Prisons*, p. 111.

would later confound the successors to the old regime of TDC, initially served to undermine the regime as it fought to preserve its authority.

The trial involved no fewer than 349 called witnesses and consumed almost exactly a full year, reflecting the multiple issues being dealt with as well as the complexity of each issue and the stubborn recalcitrance of Idar and the rest of the defense team. In his opening remarks William Bennett Turner stated that the plaintiffs would use the authority of experts and other professionals to establish the charge of deliberate indifference.[36] The most comprehensive support for Turner's charge was provided by the Justice Department, which by then had been raised to the status of a co-plaintiff.

On the issue of staffing, despite some additions TDC had been able to make in the years since Albach's report, the Justice Department's expert witnesses drew scathing conclusions. The situation at unit infirmaries, with outmanned medical assistants holding sick call and making referrals, was merely bad, but staffing at Huntsville Unit Hospital was "recklessly inadequate." Dr. Richard Della Penna, visiting the hospital in 1978, found "four or five full-time physicians that covered not only HVH [Huntsville Unit Hospital], but handled the Huntsville Unit sick call and referrals from outlying units as well."[37] With this small group of doctors stretched thin by their various commitments, inmate patients normally spent days at the hospital without ever seeing one of them. Medical assistants continued to make most of the actual medical care decisions, as well as filling many of the skilled nursing functions. After 1974, TDC had attempted to maintain a staff of up to six registered nurses, but they had all quit, largely because of

[36] See the helpful analysis of Turner's opening statement in Martin and Ekland-Olson, *Texas Prisons*, pp. 115-117.
[37] *Ruiz* Post-Trial Memorandum, U.S. Department of Justice, Volume 1 (henceforth DOJ), p. 118.

disputes with the medical assistants arising from the basic problem of the absence of doctors.[38]

This left most of the staffing needs, as before, in the hands of inmate nurses, who continued to outnumber vastly the civilian staff. Many of the inmate nurses "have poor educational backgrounds and cannot read or write."[39] But they served in most supporting functions, as technicians, attendants, record clerks, and providers of most of the nursing care, all without any other than on-the-job training. The Justice Department expert witnesses saw no cases of inmates actually performing minor surgery, suggesting that Albach's reporting had had some effect. But one of the registered nurses who had left the hospital testified to having watched as an inmate did a finger amputation, and as another x-rayed and pinned a broken finger (but missed the break).[40] Even confined generally to lesser responsibilities, inmates still routinely failed to carry out medical orders correctly, gave wrong medications and injections in the wrong sites, wrote down imprecise or unreadable notes, failed to monitor patients attentively, falsified their charts, and dealt drugs and took bribes from their patients. As in previous years, inmate nurses remained alone in charge of the hospital after hours. One professional nurse described arriving on typical Monday mornings to find bedridden patients with unchanged bandages and caked feces, their urine bags spilled on the floor.[41]

As all parties presumably expected, the plaintiffs' witnesses were unsparing in their assessment of the hospital facilities. Surveying past reports, the Justice Department

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[38] See Dr. Gray's testimony at *Ruiz v. Estelle* trial transcript, p. 959: "They wanted a doctor over them. We didn't have enough doctors."
[39] *Ruiz* Post-Trial Memorandum (DOJ), Vol. 1, p. 126.
[40] John Goforth testimony at *Ruiz* trial transcript, pp. 48-50.
[41] Cited in *Ruiz* Post-Trial Memorandum (DOJ), Vol. 1, p. 145.

brief observed that "the list of physical plant deficiencies . . . reads like a slum landlord's outstanding work orders."[42] Both the housekeeping and the state of the structure, if anything, had deteriorated further. A medical expert for the defense actually commented that he "could not believe that a warden would knowingly allow such filthy conditions to exist."[43] Basic inadequacies of design and construction—insufficient space for nursing stations or patient privacy, multiple fire hazards—remained unaddressed. Dr. Della Penna's major concern was with the overall effect of these conditions upon the ability simply to practice medicine:

> I think it's important that professionals taking care of and caring for people who are sick have an appropriate environment in an appropriate therapeutic setting. . . . In my experience it's very, very difficult to act as a professional on a day-to-day basis in a prison setting or really any setting, anyplace that doesn't have basic amenities, doesn't have basic sanitation, doesn't have adequate lighting. That's inadequate, very depressing and, I think, very demoralizing.[44]

Other expert witnesses were most concerned about the likely spread of infections in the crowded, cramped, unsanitary environment. Another visiting doctor cited the mixing of clean linen and dirty laundry, storage of drugs and bacterial cultures in the same refrigerators, and nurses changing bandages without washing their hands and using unsterilized thermometers. The lack of space for isolation wards kept patients with hepatitis and other infectious risks sharing wards and hallways with others.[45]

Some of the practices of TDC medical staff impressed the expert witnesses as clear cases of custodial concerns overriding or interfering with necessary medical care.

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[42] *Ruiz* Post-Trial Memorandum (DOJ), Vol. 1, p. 113.
[43] *Ruiz* Post-Trial Memorandum (DOJ), Vol. 1, p. 115.
[44] Dr. Richard Della Penna testimony at *Ruiz* trial transcript, p. 49.
[45] Cited in *Ruiz* Post-Trial Memorandum (DOJ), Vol. 1, pp. 117-118.

In part this reflected the prevailing, historically rooted philosophy of the prison system; other parts reflected tendencies toward arbitrary abusiveness. Within the prison units, inmates with disciplinary records were typically denied permission to attend sick call, and others were allowed to attend or not at the discretion of the guards. Asthma inhalers were banned from cellblocks, and other prescribed drugs were routinely withheld. Inmates who complained were typically punished with solitary confinement or, more frequently, with field work detail—reflecting the traditional main concern of prison farm medicine. Medical assistants holding sick call at one unit diagnosed roughly half of their patients with "trickitis," or malingering, and used infirmary space as punitive confinement for inmates who insisted that they needed treatment. Medical assistants were evaluated and supervised by unit wardens, to whom Dr. Gray and the TDC central administrative staff normally deferred.[46]

At Huntsville Unit Hospital, despite the overcrowded wards and severe space limits, much of the first and second floors was given over to cellblocks for admitted patients, many of whom were sent there for complaining about their treatment. In the cellblock sections, patients with emergencies would have to wait while inmate nurses rounded up cell keys. Arthur Driver, a former medical assistant who had become the administrator at Huntsville Unit Hospital, was accused by nurses and many inmate witnesses of threatening and abusing hospital patients. He cut off pain medication for one paraplegic inmate and transferred him to the cellblock after the patient wrote a letter

[46] Descriptions of unit level practices in this paragraph contained in *Ruiz* Post-Trial Memorandum (DOJ), pp. 48-68.

asking to be moved to where he could more easily use the commode.[47] He routinely intervened in patient care, changing their locations and prescribed diets, and told one nurse to "suture a self-mutilator with the same anesthetic the patient had used when he cut himself, i.e., none."[48] In 1976, Driver received the Outstanding Employee Award for all of TDC.

As a medium for conveying the voices and experiences of inmates under care, the trial was shaped and constrained by the legal judgments of the plaintiffs' advocates, whose task was defined by the vague dictate of the "deliberate indifference" standard. The legal standard itself, in referring to the conduct with which care was administered (or not), drove the plaintiffs to concentrate on actions, procedures, and circumstances of care rather than outcomes. The voluminous briefs compiled by the plaintiffs did not include statistical studies of inmate health or treatment outcomes; anecdotes of outcomes in the cases of individual patients were typically examined for what they could show about how treatment had been administered. The basic purpose of the plaintiffs' expert witnesses was actually twofold: to report observations, and also to cite the professional standards which should be used to evaluate the conditions and practices they observed. Dr. Della Penna, the former director of the Joint Commission on Accreditation of Hospitals, generally compared the hospital's civilian staffing patterns and treatment practices with the protocols of his organization: instead of four physicians stretched thin by other

[47] Gerald Sullivan testimony at *Ruiz* trial transcript, pp. 43-50.
[48] Descriptions of hospital security practices in this paragraph contained in *Ruiz* Post-Trial Memorandum (DOJ), pp. 136-144. Nurse testimony cited at p. 143.

responsibilities, for instance, he recommended six to eight to serve the only the hospital, three of whom should have training in emergency medicine and internal medicine.[49]

The attorneys and witnesses defending TDC's medical care had little to work with, in terms of either practices or outcomes, in asserting that it met any qualitative standard. Their case was solely a defense against deliberate indifference, a charge which they tried to define as impossible to prove. Throughout the trial they had insisted that anecdotal evidence could generally be discounted because "there must be an 'affirmative link,' a definite, systemwide practiced or policy that invariably violates the constitutional rights of inmates, before the plaintiffs can be said to have carried their burden of proof."[50] In the case of medical care, they consequently argued, the plaintiffs' "selection of medical 'horror stories' failed to prove any systematic pattern or practice inadequate care or denial of same."[51] Even failure to meet professional standards of care (something the plaintiffs had endlessly established) was irrelevant because "the evidence did not reflect a causal relationship between the deviations and any systematic injury to the plaintiff class."[52] None of the existing associational sets of correctional standards represented constitutional minimums. Even the work of inmate nurses was constitutionally unchallengeable as long as they were "acting within their technical skills and so long as a reasonable level of security is maintained," standards which TDC itself should be left to judge.[53]

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[49] *Ruiz* Post-Trial Memorandum (DOJ), Vol. 1, p. 118.
[50] *Ruiz* Defendants' Post Trial Brief, p. 5.
[51] *Ruiz* Defendants' Post Trial Brief, pp. 85-86.
[52] *Ruiz* Defendants' Post Trial Brief, p. 86.
[53] *Ruiz* Defendants' Post Trial Brief, p. 112.

Another line of argument for state attorneys was that the charge of deliberate indifference could be refuted by virtually any pattern of demonstrated concern or activities aimed at improvement. The state attorneys gamely maintained that "TDC has always had the critical elements of a constitutionally minimal health care system," but they placed more emphasis on TDC's supposedly self-motivated efforts to improve the system.[54] They acknowledged that "the improvements have taken time" (like the trial itself, perhaps not coincidentally). But the Galveston hospital under construction was due to open shortly, a dedicated ward that had been created at John Sealy Hospital in the meantime to take in additional patients from Huntsville Unit Hospital, and legislative appropriations had been secured for additional staff in most areas of care.[55]

Ed Idar later claimed that the attorneys defending the state were certain that Judge Justice would rule against them on all counts, and that the trial record and arguments they created were ultimately addressed to the appeals court.[56] The judge and his clerks spent over a year studying the vast trial record and drafting the memorandum opinion, but when it was finally issued on December 12, 1980, the ruling lived up to its part of the defendants' expectations. Justice found for the plaintiffs on five major grounds—overcrowding, health care, security and supervision, summary discipline, access to courts—as well as miscellaneous others. On medical care, as the plaintiffs must have hoped, the judge's findings followed both the observations of the expert witnesses and the use of professional standards to evaluate what the witnesses had observed.

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[54] *Ruiz* Defendants' Post Trial Brief, p. 83.
[55] *Ruiz* Defendants' Post Trial Brief, pp. 92-93.
[56] Quoted by Frank Kemerer in *William Wayne Justice: A Judicial Biography*, p. 365.

Essentially, the court argued that TDC's provision of medical care was unconstitutional mainly because it was unprofessional:

> The personnel providing medical care are often unqualified; they are also wholly insufficient in numbers and deficiently supervised. The meager medical facilities, inadequately equipped and poorly maintained, do not meet state licensing requirements. Medical procedures are unsound and faulty at all levels of care. Initial processing, sick call methods, and transfer practices are all unnecessarily cumbersome, inefficient, and life-threatening. Proper medical treatment and practice is often sacrificed to exaggerated concerns about security. . . . Finally, the entire medical care "system" is marked by an absence of any organizational structure, plan, or written procedures for the delivery of medical care or for the instruction, supervision, and review of the personnel putatively providing it. These factors combine to produce a system that persistently and predictably fails to provide for the legitimate medical needs of the prison population.[57]

Significant sections of the opinion text actually echoed the language of the plaintiffs' expert witnesses and the arguments of the Justice Department brief. The number of physicians providing care in TDC was, as the Justice Department had put it, "woefully inadequate."[58]

Judge Justice faithfully cited each of the plaintiffs' findings regarding staffing, personnel, facilities, and the placement of custodial over medical priorities. The system had "an acutely grim and unwarranted lack of licensed nurses. . . . TDC's failure even to attempt to employ RN's and LVN's in its hospital and unit infirmaries vividly demonstrates its virtual abdication of responsibility for the provision of adequate health care for its inmates."[59] With medical assistants screening and providing most care, "the typical inmate's access to health care is regulated from the outset by persons who would

[57] *Ruiz* Memorandum Opinion (Dec. 12, 1980), pp. 115-116.
[58] *Ruiz* Memorandum Opinion, p. 116, compared with *Ruiz* Post-Trial Memorandum (DOJ), Chapter II (A) section 4 (a), titled "The Huntsville Unit Hospital Is Woefully Inadequate."
[59] *Ruiz* Memorandum Opinion, p. 120.

be qualified to perform only orderly-type functions at a free-world hospital."[60] Inmates formed "the backbone of the TDC medical system," and the use of inmate nurses "necessarily creates deplorable obstacles to effective treatment of inmate patients."[61] As for facilities, "it is highly questionable whether TDC's 'hospital' at Huntsville can be accurately labeled as such," since its accreditation was long lost.[62] Citing both the trial witnesses and Albach's report, Judge Justice went over some of the building's deficiencies, but was most concerned that it remained a firetrap. Its continued use to house bedridden patients represented "chilling indifference" on the part of TDC officials.[63] The restrictions on access to medical care at prison units and the use of confinement at Huntsville Unit Hospital showed that "all aspects of medical care are compromised by security and disciplinary considerations."[64]

If his individual findings largely tracked the testimony and pleadings of the plaintiffs, Judge Justice offered his own critically important argument about the relation of medical care to the rest of the suit. To a degree the judge's original decision to consolidate the key inmate claims may have failed in part of its purpose, in that the need to separate the sprawling *Ruiz* opinion into manageable units of analysis meant that its key portions were all too easily considered in isolation from each other. Also, the case against the constitutionality of medical care provision involved its own standard that did not relate directly to other matters. But in setting forth the case against TDC on one of the other basic issues, Judge Justice used deliberately broad language: "The

[60] *Ruiz* Memorandum Opinion, pp. 124-125.
[61] *Ruiz* Memorandum Opinion, p. 129.
[62] *Ruiz* Memorandum Opinion, p. 139.
[63] *Ruiz* Memorandum Opinion, p. 140.
[64] *Ruiz* Memorandum Opinion, p. 154.

overcrowding at TDC exercises a malignant effect on all aspects of inmate life."[65] Solving this issue, Justice indicated, was necessary (if not sufficient) to the solution of all the others. Overcrowded prisons could not be kept secure; they could not maintain the other basic functions to which prisoners were entitled; overcrowded prisoners could not be kept safe or healthy:

> Crowded two or three to a cell or in closely packed dormitories, inmates sleep with the knowledge that they may be molested or assaulted by their fellows at any time. Their incremental exposure to disease and infection from other inmates in such narrow confinement cannot be avoided. They must urinate and defecate, unscreened, in the presence of others. . . .[66]

The argument was most vividly conveyed by the image of three men packed in a cell, but it applied with no less force to the prison's other functions. Texas had never provided basic services adequately to its prison inmates, but any efforts that it had begun to make or would make in the future were doomed if the prisons were to be perpetually overcrowded. Judge Justice's assessment of prison medicine made it explicitly clear that care must meet professional standards. For this reason, as well as for others, he made it equally clear that there would have to be fewer prisoners.

The *Ruiz* verdict was a landmark, but the harder tasks still lay ahead. The struggle over implementation—what exactly constituted relief, what ultimately would the state be required to do—continued to unfold over the next two decades. As in the trial stage, medical care provision was only one of the subjects of dispute, but its resolution

[65] *Ruiz* Memorandum Opinion, p. 14.
[66] *Ruiz* Memorandum Opinion, p. 14.

was tied to decisions on other subjects. The shape and extent of relief on overcrowding affected the future of prison medical care most profoundly.

For its part, the resolution of prison medical care issues had broad implications of its own, legally and socially. The *Ruiz* verdict by itself was of limited value in establishing minimum Eighth Amendment standards for health care, because the legacy of deliberate indifference to inmates' health—embodied vividly by the Huntsville Unit Hospital—was so severe. But how could the circumstances be remedied, practically speaking, and how could remedies sufficiently ambitious to bring real change also be made judicially supportable? Ironically, the particular circumstances that made the verdict easier to reach (and harder to overturn) were the same ones which threatened to limit its practical effects.

Medical professionalism—specifically professionally defined standards, and the role of professional organizations in certifying the fulfillment of these standards—was at the center of the implementation struggle. Overall, certification served the interests of both plaintiffs and the state at different times; in fact, the state used its commitment to seek certification as a means of settling most of the plaintiffs' case on medical care. But if professional standards were sufficient to meet constitutional standards, were they necessary? How to resolve this question would have far-reaching consequences. Once again, Huntsville Unit Hospital was at the center of the dispute. What to do with the hospital was the one medical-care issue which the state refused to settle with the plaintiffs, and which was raised in the state's appeal to the Fifth Circuit. Judge Justice maintained that prison hospital care must also meet professional standards. He, as well as

the plaintiffs, faced the tough task of affirming this position while still demonstrating reasonableness in dealing with the practical and logistical issues that the state was able to raise. On this issue, as on others, the state basically continued the same battle it had waged during the trial. The final outcome did not deprive the plaintiffs of relief, but it narrowed its scope by lowering the necessary standards.

After the trial verdict, the state's decision to settle most of the medical care issues was a quick one, reflecting the serious consideration that had been given to settling them before the verdict. The decision also reflected a readiness to commit to compliance with professional standards, as a means of resolving the case. Assuming the virtual certainty of an adverse verdict, TDC officials during 1980 studied the American Correctional Association's health care standards and concluded that most of them would ultimately be met "if TDC continues in the current directions of improving health care services."[67] The positive conclusion applied to the medical care system as planned, not in its then-current state. Soon after the verdict was issued, TDC managers contacted the director of the American Medical Association's Jails Program and made preparations to apply for AMA accreditation.[68] In late January 1981, TDC's assistant director for treatment formally recommended to Estelle that the agency should seek an agreement with the plaintiffs on the basis of a commitment to "operate a health care system capable of accreditation by

[67] Allen D. Sapp, Jr., "Proposed TDC Health Care Services and the American Correctional Association Standards: A Comparative Analysis," Working Paper No. 59-07-80, July 1980, Texas Department of Corrections Treatment Directorate, Operations Research, Planning and Development, in Box 37, Folder 12, Eduardo Idar, Jr. Papers, Benson Latin American Collection, the University of Texas at Austin Libraries.
[68] TDC Inter-Office Communication, Bill Barry to Bob Bozzelli, 1/7/81, describing telephone conversation with Joseph Rowan, AMA Jail Program director; Inter-Office Communication, 1/8/81, Barry to Bozzelli, summarizing conversation between Rowan and several TDC officials; and letter, 1/9/81, Rowan to Barry, with assembled application form, self-survey questionnaire, and other materials attached; all in Box 37, Folders 12 and 13, Idar Papers.

the American Medical Association." According to the proposal, TDC should also agree that the its new hospital (still under construction at the University of Texas Medical Branch in Galveston) should maintain accreditation from the leading professional certifying organization (the Joint Committee on Accreditation of Hospitals), and other new facilities with plans to be sanctioned by the Texas Hospital Association.[69] As state officials developed their position for negotiations with the plaintiffs, as instructed by Judge Justice, they agreed early on to try to settle the health care issues on these terms.[70]

While the negotiations left most issues in the case unresolved, they yielded broad agreement on upgrading medical care, essentially elaborating on the terms TDC had developed. The consent decree entered on March 3, 1981 committed the state to apply for AMA accreditation, to plan for achieving compliance with standards and obtaining accreditation under the court's supervision, and to develop new standards, together with the Texas Hospital Association, to address any "architectural, engineering, or equipment needs of prison health care facilities" not addressed by the AMA. Other commitments by the state included seeing that "no nonmedical staff may countermand any medical order regarding a prisoner's treatment," that prisoners in administrative segregation received "full access to health care," and that prisoners would not be deprived of prescribed medications or "denied access to work, recreation, education, or other programs or opportunities because of health status unless required for medical reasons as determined by a licensed physician." The state agreed to file a plan with the court by June 1, 1981

[69] TDC Inter-office Communication, Ronald D. Taylor to W. J. Estelle, Jr., 1/21/81, Box 37, Folder 13, Idar Papers.
[70] Paul T. Wrotenbery, budget aide to Gov. Bill Clements, outlined TDC's emerging negotiating position in memo, Wrotenbery to Gov. Clements, 2/9/81, Box 37, Folder 22, General Counsel Records, 1979-1983, William P. Clements, Jr. Papers, Texas A&M University Libraries.

"which will assure that prisoners receive necessary medical, dental, and psychiatric care from the moment of their arrival in TDC."[71]

Whether state officials ever consciously related these commitments to Huntsville Unit Hospital is unclear, since, mystifyingly, the consent decree made no mention of the facility (even though accreditation of the Galveston hospital was specifically included).[72] But at some point during the weeks that followed, state officials conveyed their intentions to Judge Justice. On April 20, in his decree containing remedial orders for aspects of the case not already settled, the judge made clear that no exceptions to the agreement contained in the consent decree would be allowed. Huntsville Unit Hospital, he decreed, must be "downgraded to use as the unit infirmary and shall not be used for care of prisoners from other units unless, by November 1, 1981, it can be brought into compliance with the standards of the Texas Hospital Association or the Joint Commission on Accreditation of Hospitals." Failing to make HUH compliant, TDC would be required to arrange with other, accredited facilities to provide care for prisoners. Also, the section of the decree pertaining generally to inmate trusties (which was mainly intended to eliminate the broad authority of "building tenders") prohibited inmate access to any other inmate's medical records.[73]

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[71] *Ruiz v. Estelle*, Consent Decree, 3/3/81, copy in Box 28, Folder 6, Idar Papers.

[72] How carefully and clearly state officials considered all of the provisions is open to question. William Bennett Turner later stated that one of the provisions of the decree that was later sharply criticized—regular food rations for inmates in solitary confinement—was offered, somewhat randomly, by Attorney General Mark White in a phone call with plaintiffs' attorneys, in exchange for minor changes in unrelated language. See Martin and Ekland-Olson, *Texas Prisons*, pp. 179-180.

[73] *Ruiz* Amended Decree Granting Equitable Relief and Declaratory Judgment, May 1, 1981, sections III and II (D), in folder "Amended decree. . . ," Box 2004/016-3, Texas Department of Criminal Justice, General Counsel's Office, Ruiz Case Files, Archives and Information Services Division, Texas State Library and Archives Commission (henceforth Ruiz Case Files). The version dated May 1 contains typographical corrections of the April 20 version and minor substantive amendments.

Efforts by state officials to carve out an exception for Huntsville Unit Hospital presumably followed from objections raised by Dr. Ralph Gray, the prison physician whose list of official responsibilities had so impressed John Albach during the joint prison reform committee's investigation. Some seven years later, Gray was no longer the only full-time physician employed by TDC, but as assistant director for health services he was still responsible for supervising the running of the hospital and the provision of other care throughout the system. Gray had testified as a witness for the state in the trial stage of the case, in August and September of 1979, and under cross-examination he had acknowledged that the hospital was outdated and inadequate in many respects.[74] But now, in an affidavit dated April 16, 1981, he made the case for keeping HUH open. The case actually consisted of two distinct claims. One was that the hospital and its staff had been significantly upgraded in the short time since the end of the *Ruiz* trial. Gray could not seriously maintain that the quality of care being provided was high, or even adequate, but he could at least seek to demonstrate TDC's bona fides. He offered a list of sixteen specialist positions that had been newly added to the staff, and he cited the recent hiring of two part-time physicians and three dentists, and other technicians, on top of his existing staff of three full-time and two part-time physicians and various other assistants, nurses, and technicians. He gave a similarly detailed list of equipment improvements, which included "a magnatherm shortwave diathermic unit (providing heat therapy to deeper layers of skin and muscle tissue without risk of burn on outer layers) as part of the

[74] Gray's testimony is cited by Martin and Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down*, at pp. 155-156.

physical therapy equipment (making TDC possibly the only prison institution in the country with such a piece of equipment)."[75]

Notwithstanding the diathermy unit, Gray's other argument was the main one: that hospital services for TDC inmates would be made unavailable if HUH was closed. The hospital contained some 100 to 120 inmates (including some thirty geriatrics, 25 severely handicapped patients, and five to eight tuberculosis ward residents) who could not be placed elsewhere. Gray explained that the HUH administrator, under his supervision, had informally surveyed all the "free world" hospitals within range of the unit prisons clustered around Huntsville, and found that "free-world hospital care as an alternate [*sic*] is available on, at best, a very limited basis, and at considerable expense."[76] The hospitals would offer primary care only, accommodating small numbers of inmates on a space-available basis, with supervision by TDC security staff required at all times (creating prohibitive costs). The already-existing prison wing at John Sealy Hospital in Galveston was too small and distant to substitute entirely for HUH. Until the new building in Galveston was finished, Gray concluded, closing the Huntsville facility could only result in "the substantial curtailment of medical treatment."[77] Finally, he added, "the impact of eliminating the use of inmates in handling medical records would be that medical care would virtually be eliminated." Inmate clerical staff would eventually be

[75] Perhaps more to the point, Gray also noted that a new fire escape had been installed, and the emergency room and first aid facilities no longer had to share the same space. Affidavit of Ralph Edward Gray, notarized 5/16/81, in folder "Defendant's Alternative Hospital Plan, Aug. 17, 1981," Box 2004/016-51, Ruiz Case Files.
[76] Gray affidavit, 5/16/81, p. 7.
[77] Gray affidavit, 5/16/81, p. 10.

eliminated under TDC's long-term plans, he maintained, but forcing it to be done immediately would be "catastrophic."[78]

State officials initially tried to use Gray's affidavit to make an end run around Judge Justice, inserting its claims into their appeal to the Fifth Circuit for a stay of Judge Justice's remedial orders.[79] The circuit court judges issued a stay order on June 26, with crucial consequences for the resolution of the overcrowding issues in the case, and they seemed sympathetic to TDC's position on the Huntsville hospital. Their order suggested that, given Gray's legitimate concerns, "the equities may favor a stay" of Judge Justice's orders as they related to the hospital. But they could not let the defendants get away with such obvious maneuvering: "The State is entitled to present these facts to the district court in a motion to modify or a new motion to stay."[80]

Along with the stay motion, the state submitted to Judge Justice an "Alternative Hospital Plan," containing a slightly expanded version of Gray's arguments, in lieu of the compliance plan required by the remedial order.[81] The new list of "improvements and/or changes" since the *Ruiz* trial cited the same staff additions, new equipment, renovations, and other improvements as before, with a few late additions. One was that "the medical records office is now staffed exclusively with staff personnel; all inmates have been

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[78] Gray affidavit, 5/16/81, p. 12.
[79] The motion for a stay was before the appeals court already because the state had preemptively submitted a stay motion to Judge Justice before his remedial decree was even handed down. Clearly the state wanted to bring the case before the Fifth Circuit as soon as it possibly could. Justice's denial of the motion was released simultaneously with the remedial decree. See *Ruiz v. Estelle*, Order Denying Stay, undated copy (but released on 4/20/81), in Box 28, Folder 4, Idar Papers. Idar's motion to stay is at Box 34, Folder 2, Idar Papers.
[80] *Ruiz v. Estelle*, 650 F.2d at 562-563.
[81] See "Alternative Hospital Plan," 8/17/81, in "Defendant's Alternative Hospital Plan, Aug. 17, 1981," Box 2004/016-51, Ruiz Case Files. Justice's remedial order had directed TDC to produce a compliance plan by August 1.

removed from the area."[82] The "plan" document also reviewed the unavailing contacts with area hospitals and the medical services which would be eliminated with the closing of HUH. The overall arguments, however, were restated and sharpened for Judge Justice's benefit. Somewhat audaciously, the maintenance of the facility's hospital functions was recast as a professional obligation:

> The closure of the Huntsville Unit Hospital would be in direct confict with the ethical code of the medical profession; the doctors would be placed in the untenable position of violating their oath as physicians or violating the mandate of the Court. The effect of closure upon the inmate population would be immeasurable, causing unnecessary suffering, enforced denial of medical and/or surgical care, curtailment of elective care or, in the extreme, possible loss of life.[83]

Specific recent cases were cited of inmates requiring critical care which was provided on site. The "plan" also cited the annual number of plastic surgery procedures which were conducted on site, all of which would presumably be lost to inmates. Even after the new Galveston hospital was open, "the need for the Huntsville Unit Hospital will continue for the convalescent care" of patients released from Galveston. The conclusion of the document actually raised the issue of professional standards explicitly, only to argue that the continued provision of care was more important: "Realizing that JCAH accreditation is unattainable, the hospital staff remains committed to its obligation of ensuring that all patients continue to receive the best care that is in their power to provide.[84]

How valid were Gray's claims and arguments? With action now required on the state's motion to stay, the court needed updated information on conditions at HUH from a

[82] Presumably this had few "catastrophic" effects. See "Alternative Hospital Plan," pp. 9-10.
[83] "Alternative Hospital Plan," p. 19.
[84] "Alternative Hospital Plan," p. 22.

credible source. One new evaluation was provided by Texas Department of Health inspectors, who evaluated the facility in June at TDC's request to determine whether it would meet Medicare standards. The "Alternative Hospital Plan" itself acknowledged this inspection, as well as its negative verdict.[85] For more, Judge Justice relied on the contacts of the special master he had appointed, Vincent P. Nathan, an expert in reform litigation who had accepted the imposing challenge of bringing about TDC's compliance with the court's orders. Nathan selected Dr. Robert L. Cohen, a specialist in internal medicine who was then serving as associate medical director of health services at the Rikers Island complex in New York City. Cohen toured the Huntsville facility on August 13 and 14, 1981, conducted interviews, reviewed charts and death records, and submitted his report five days later.

Compared with what John Albach had witnessed in 1974, Cohen's report does show that meaningful efforts had been made to improve hospital care for Texas prison inmates. But it easily served the court's purpose of demonstrating that Huntsville Unit Hospital was still fundamentally a primitive place by modern medical standards, in some ways only slightly influenced by "free world" practices. The medical staff now included four full-time physicians (not including Dr. Gray) and two physician's assistants (plus a non-licensed physician who ran the paraplegic ward). Cohen observed at length the work of Lloyd Ashberger, one of the PAs, and reported that he was "impressed with the quality of Mr. Ashberger's medical judgment and fund of knowledge." But he watched with

[85] "Operational, structural, and staffing deficiencies preclude compliance with Medicare standards." "Alternative Hospital Plan," pp. 16-17. The Department of Health report was also cited in Robert L. Cohen's report (see below), which outlined and endorsed its conclusions.

mounting unease as Ashberger, on his own, treated an emergency room patient with an injured leg:

> On the basis of his reading of the X-ray, he judged that no fracture had occurred and explored the wound. He found a deep muscle tear which he sutured, and left the skin wound uncovered. He countersigned Dr. O'Hare's signature to the admission note in the hospital chart. Mr. Ashberger did not call any M.D. for consultation, nor did he attempt to get any orthopedic consultation. He told me that he was sure that if an orthopedic surgeon had seen the patient, the patient would have had an operation. No adequate examination of [the patient's] knee was made.[86]

After witnessing this case, Cohen went on to learn that Ashberger also routinely "diagnoses and treats complicated stab wounds to the chest."[87] Cohen's reporting virtually appealed for help on behalf of the inmate patients. "HUH cannot function as a major trauma center," he asserted, "and it is incumbent upon the staff there not to think of themselves as providing complicated, tertiary care." Procedures which would not be undertaken by licensed physicians in other specialties were "clearly beyond the reasonable responsibilities of an unsupervised physician's assistant."[88]

In the view of an observer from outside, the absence of professionally qualified staff and the performance of functions by unqualified personnel still determined every aspect of the hospital's operations. Unlicensed medical assistants supervised the facility, including the emergency room, at night. Pills were dispensed by MAs without pharmaceutical training. Radiological exams and lab work were similarly carried out by untrained, unsupervised staff. And, like Albach, Cohen gradually reached the realization

[86] Robert L. Cohen, "Report and Recommendations Concerning the Status of Huntsville Unit Hospital," p. 8, found in Box 36, Folder 1, Idar Papers.
[87] Cohen, "Report," p. 9.
[88] Cohen, "Report," p. 9.

"that the hospital operation at this time is completely dependent upon inmate personnel." Inmates served as assistants and technicians throughout the hospital (though not as surgeons, at least during Cohen's visits). Cohen watched one inmate worker try (and fail) to draw arterial blood from an intensive care patient. Inmate nurses were formally designated as orderlies or nurse's aides, but in fact they had "primary responsibility for observing patients" in most areas, at most times: "During the afternoons and evenings the only way a hospitalized prisoner can get access to medical care is by appealing to the inmate nurses for help, or to call the MA who is located on the first floor. Clearly, involving inmates in this screening process sets up a dangerous dynamic, guaranteed to lead to abuse."[89]

The premises still abounded with other conditions and practices which everyday staff took for granted but which shocked the first-time visitor. Water seeped through the ceiling cracks in the operating rooms. Nurses washed their hands in mop sinks. A patient with clear symptoms of tuberculosis was left coughing in the open medical ward while the staff waited on his lab work. Cohen was even more appalled by his visit to the dimly lit "cell block" area of the hospital, for patients in medical segregation, where one inmate with advanced metastatic cancer had been sent for slashing his own arms. Cohen's review of mortality cases cited four examples of inmate deaths which clearly reflected misdiagnosis, neglect, and otherwise deficient care which seemed all too consistent with his own observations.[90] His final recommendations were emphatic and

[89] Cohen, "Report," p. 12. But, consistent (presumably not by sheer coincidence) with the claims in the "Alternative Hospital Plan," the medical records coordinator told Cohen that there were no inmates working in medical records.
[90] For Cohen's observations of the "cell block," see "Report," pp. 28-35.

not exactly ambiguous: HUH must be downgraded to an infirmary, should provide nursing and 24-hour emergency room coverage by actual nurses and doctors, and should arrange with area hospitals and the Galveston facility for transfer of patients requiring surgery or other critical care.[91]

The persistence of the conditions prevailing in the Huntsville Unit Hospital—behind the walls, but nevertheless one of the prison facilities most open and best known to professionals from outside—seems a revealing if not necessarily surprising example of what some doctors were willing to tolerate, or accommodate. Albach and Cohen were both willing to attribute decent motives to figures like the beleaguered Dr. Gray, to whom they could attribute a resigned acceptance of grim circumstances, along with a commitment to alleviating them as best he could. But arguably deeper, in its way, than the squalor of the conditions themselves was the willingness of some medical professionals to contribute actively to their persistence. Gray's appeal to keep HUH open might be seen as one example, but also might be mitigated by legitimate concern for patients with no place to be sent. The circumstances accompanying Cohen's appointment, however, offer other examples. After the order appointing Cohen was entered by the court, TDC was given five days to submit any objections. Ed Idar, still actively representing TDC, objected both to the procedure and to Cohen himself. Gratuitously, Idar asserted the defendant's prerogative to submit alternative nominations for the position of medical expert for the court.[92] The individuals Idar put forward, Drs.

[91] For Cohen's final recommendations see "Report," pp. 42-43.
[92] *Ruiz v. Estelle*, Opposition to the Appointment of Dr. Cohen and Making Alternative Nominations to the Court, in Folder "Opposition to the Appointment of Dr. Cohen . . . (Aug. 5, 1981)," Box 2004/016-1, Ruiz Case Files.

Vernon Knight and Robert Couch, were both professors at Baylor College of Medicine in Houston, and both occupied positions of eminence: Knight was the chairman of the Baylor microbiology department and senior attending physician at Methodist Hospital, while Couch directed Baylor's Influenza Research Center. Idar argued that their availability locally made it unnecessary—and therefore indefensible—"to go nearly 2,000 miles to the East Coast to obtain experts to assist the Court in evaluating and monitoring the prison hospital unit."[93] Even more compelling, in Idar's view, was the familiarity with Texas prisons that came from their longstanding relationships with the system:

> Both Drs. Knight and Crouch already have extensive experience in the area providing medical services in the Texas Prison System in the context of medical research utilizing prison volunteers from approximately 1967 through 1977. This research project involved approximately 6,000 inmates. Drs. Knight and Crouch during this time personally examined and completed health evaluations of approximately 1,200 inmates. They have also rendered gratuitous medical care to inmates at several of the TDC institutions over several years. They have had the opportunity to observer the TDC health care system and everyday operations for a number of years.[94]

In Idar's view, the willingness of two of the state's leading physicians to act as court experts was a credit to them and their institution. In light of accounts such as Cohen's, their willingness to serve at the defendants' request, on the basis of their long association with the prison system (not simply as caregivers but as researchers), seems less morally outstanding. For Vincent Nathan and Judge Justice, as well as the plaintiffs, TDC's relationships with leaders of the Texas medical establishment were undoubtedly part of the problem, and part of the vital importance of an expert from outside, like Cohen, was

[93] "Opposition to the Appointment," p. 4.
[94] "Opposition to the Appointment," p. 4.

precisely his absence of local ties, and his consequent willingness to affirm basic professional standards without fear or favor. In hearing out explanations for the orthopedic care provided at HUH by Lloyd Ashburger, the PA, Cohen concluded that the episode represented "a symptomatic and systemic problem, rather than an individual case of mistreatment."[95] The same might perhaps explain the apparent unwillingness of Knight and Couch to advance conclusions such as Cohen's during their long years of familiarity with the system, as well as their apparent willingness to serve as expert witnesses at the system's request.

In responding to the state's motion to stay, Judge Justice and the plaintiffs faced a dilemma. Cohen's investigation proved that conditions at HUH remained intolerable (and suggested that they were irredeemable), but Gray's objections could not be dismissed (or even addressed by any means available to the court). Most importantly, despite its own refusal on procedural grounds to consider Gray's arguments for staying Justice's order, the Fifth Circuit had signaled its own probable willingness to issue the stay, after Justice rejected it, on the strength of those arguments—and ultimately to overturn the stay order itself.

For the plaintiffs and for Judge Justice, dealing with the stay order as it came back to the district court appears to have amounted to the crisis of the whole episode. The importance of the dilemma extended well beyond the hospital itself. Perhaps without initially intending to do so, the state had managed to separate the question of constitutional standards from the mechanism of professional standards and had found a plausible way of claiming to fulfill one without reaching the other. If the plaintiffs and

[95] Cohen, "Report," pp. 8-9.

the judge ceded ground on the hospital order, it meant losing the identification of professional standards as constitutionally required. But if they held their ground, they risked losing all remedial control over the hospital.

In responding to the state's arguments to Judge Justice regarding the stay, the plaintiffs' attorneys made the decision to seek a line of retreat, putting forward a list of conditions under which they were willing to endorse a stay.[96] Some of the conditions amounted to restated, somewhat pared-down demands for solutions to some of the infirmary's worst and most intractable problems, such as unsanitary conditions and lack of supervision by qualified medical and nursing staff. But, more importantly, they also included the *de facto* downgrading of the hospital by taking away its acute care and surgical functions (again, unless it could be brought into compliance with Medicare standards, as cited in the inspections by the Department of Health). This would not meet the demands in the "Alternative Hospital Plan," but it went some distance toward meeting Gray's stated concerns for the hospital's most helpless long-term patients.

Justice followed the plaintiffs' lead. He also saw the need to make a tactical retreat but was determined not to let the state establish its desired principle. On October 19, he issued a response to the various accumulated stay motions filed by the state, including the stay of the HUH order (and the "Alternate Hospital Plan").[97] He cited Cohen's report (and the conclusions of the Department of Health) as evidence against

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[96] *Ruiz* Plaintiffs' Response to Motion to Stay or Modify Injunction, as cited in *Ruiz* Order, 10/19/81, Folder "Order denying defendants' motion to stay or modify injunction, Oct. 19, 1982" [should read 1981], Box 2004/016-6, Ruiz Case Files; and as excerpted in *Ruiz* Defendants' Response to Plaintiffs Conditions Concerning Huntsville Unit Hospital, in Folder "Defendants' response. . . ," Box 2004/016-1, Ruiz Case Files.

[97] *Ruiz* Order, 10/19/81.

Gray's claims, and claimed that "the factual findings based on testimony adduced at trial will not be vacated on the basis of Dr. Gray's affidavit." But while his order might not be vacated, Justice was willing to modify it. The hospital, he maintained, was demonstrably unsuitable for provision of acute care, but nevertheless it played "a critical role in the full provision of health care to inmates, other than those who require acute care. . . . Inmates who require non-acute care may well be harmed by the downgrading of the Huntsville Unit Hospital. Certainly, this deprivation was not contemplated in the Amended Decree, and it will not be visited on the inmates."[98] The invocation of acute care as the critical function that the hospital was still required to serve, taken straight from the plaintiffs' conditions, did not truly characterize the claims made by Gray or the conclusions reached by Cohen, but it offered Justice the compromise he needed. Reluctantly and somewhat wryly, Justice concluded that "it appears that the interests of the inmates, as well as of TDC, will be served by issuance of a stay." But the stay was conditional and subject to review. Citing and endorsing the plaintiffs' conditions for supporting the stay, Justice directed the defendants to respond to each of the conditions, and ordered the parties to meet yet again and try to settle the matter. "This process should produce a reasonable solution to the disadvantageous conditions, which will obviate the need to enforce the health care provisions of the order by further injunctive action."[99]

Justice's order reflected the tactical good sense which generally enabled him to secure a substantial amount of relief and remediation, in the face of state resistance, and in the face of a largely unsympathetic appeals court. By granting the stay, on his own

[98] *Ruiz* Order, 10/19/81, p. 18.
[99] *Ruiz* Order, 10/19/81, pp. 18-19.

terms, he preempted the appeals court's consideration of it. At the same time, he left himself the option of lifting it, as a possible source of pressure on the defendants to settle. Without the likelihood of an unconditional stay from the appeals court, the defendants might still anticipate an overturning of the order itself on appeal, but in the meantime Justice would require them to negotiate, which might permit the plaintiffs to salvage some even in the event of an adverse appeals court ruling. And the defendants also had to weigh the possibility (albeit perhaps a distant one) that Judge Justice's willingness to accommodate them might favorably influence the appeals court's view of his orders.

Whatever the extent of his calculations, Judge Justice seemed to solve the problem of encouraging the parties to negotiate seriously. It turned out that the importance to the state of carrying on a full range of hospital functions at HUH was, after all, not so great. Within days of Justice's stay order, the state submitted a response to the plaintiffs' conditions which addressed them all seriously and accommodated them all to some degree. The response to the first condition was perhaps the biggest surprise: "Defendants are willing to agree not to admit to Huntsville Unit Hospital, or retain as patients in that facility, patients who are, in the opinion of the attending physician, seriously or critically ill or injured."[100] Instead the hospital would retain the ability to stabilize such patients until they could be transferred. The intensive care unit would be shut down. The defendants objected to the condition banning surgeries in the operating room, but were "willing to agree not to perform non-emergency general surgery such as

[100] *Ruiz* Defendants' Response to Plaintiffs Conditions, p. 2.

hernia repairs, appendectomies, some hemorrhoidectomies, and gall bladder surgery."[101] The defendants' responses to three of the other plaintiffs' conditions—placing terminally ill patients in non-prison settings, keeping handicapped patients out of isolation, and maintaining better sanitation—described elaborate and detailed plans already being pursued. Willingness to negotiate over the hospital allowed TDC officials to pick and choose the functions they wished to maintain and the improvements they wished to make. Giving up the burden of acute care turned out to be entirely acceptable.

With the state willing to settle, a formal agreement was soon reached—which ended one phase of the dispute only to begin another one. Judge Justice, citing his appreciation for the state's reasonable response, directed the parties to work out a draft consent decree and submit it to him jointly.[102] Several weeks of meetings produced the terms of a stipulation that Judge Justice received in late January and approved on February 15, 1982, officially amending his earlier decree.[103] One newly drafted condition now allowed for emergency medical care at HUH if the local Huntsville hospital refused to provide treatment (and if transporting the patient to Galveston or another hospital was inadvisable, in the judgment of the attending physician). The defendants were charged with using "their best efforts" to finalize an agreement with the Huntsville hospital which by then was already being worked out (despite Gray's prior representations regarding his initial contacts). Otherwise, HUH would be allowed to

[101] *Ruiz* Defendants' Response to Plaintiffs Conditions, p. 5. The defendants went on to insist that elective plastic surgery and podiatric procedures should continue to be done on the site, referring to the arguments from their briefs.
[102] *Ruiz* Order, 11/15/81, Box 2004/016-1, Ruiz Case Files.
[103] *Ruiz v. Estelle*, Stipulation and Order Modifying Decree, 2/15/82, in Folder "Stipulation and order modifying decree, HUH, 2-15-82," Box 2004/016-6, Ruiz Case Files.

remain open, subject to "limitations and conditions" that closely followed the plaintiff's suggested conditions and the plans and improvements the state had claimed to be making.

The "stipulation and order modifying decree" settled the arguments between the parties that the Fifth Circuit had heard in the appeal of Judge Justice's original order on HUH, but the court nevertheless handed down its decision on the original, unmodified decree. The decision was still important not because of its immediate bearing on the case but because of its treatment of the underlying purpose of Judge Justice's original order—the identification of professional standards of medical care for prisoners as constitutional ones. The appeals court took the trouble to reject explicitly what the plaintiffs and Judge Justice had conceded largely. The court's decision on HUH was a small section of its June 23, 1982 decision on the array of objections and appeals the state had pursued. In this section, the court cited the "deliberate indifference" standard from *Estelle v. Gamble*, noted the inadequacy of the HUH facility as acknowledged by TDC, and then proceeded to argue that requiring the facility to meet the standards of hospital certification was absurd:

> Although HUH does not meet these standards, the record establishes that no prison hospital in any other state does. Some Federal Bureau of Prisons hospitals meet them but others do not. Of the 7,000 private hospitals in the United States, only 3,000 meet JCAH standards adequately for full accreditation and an additional 1,000 are on probation or one-year accreditation; the other 3,000 are not accredited because they do not meet the standards. Literally millions of persons receiving private medical care are being treated in hospitals that do not meet the requirements imposed by the district court's decree.[104]

[104] *Ruiz v. Estelle*, 679 F.2d at 1150.

The comparison of high standards of provision for prisoners with lower standards with those available to free-world citizens was a staple of the state's legal and political case during the appeal, on overcrowding as well as medical care. In its ruling the appeals court indicated that it bought the argument wholeheartedly. Whatever the place of professionalism in corrections might be, there was no doubt about what it was not: "Expert standards are a useful guide but they are not a constitutional measure." Judge Justice's already-moot order was vacated, and the already-settled issue was remanded to his court with the instruction that any injunctive relief "shall not command the closing of HUH or restrict its use solely to Huntsville inmates. The order should instead be limited to requiring that TDC provide the minimum level of hospital care required by the Constitution."[105]

In rejecting expert standards as a constitutional measure, the appeals court rejected the strategic thrust, if not all the ameliorative effects, of litigated prison reform in Texas. The court left intact the achievement of Judge Justice and the plaintiffs in establishing the unconstitutionality of Texas prisons as they found them. But it would not allow them to use the *Ruiz* case as a landmark establishing a new, higher standard for Texas and the rest of the nation as well. State officials had sought to use Gray's arguments to keep all final orders and decrees as narrow as possible. But their willingness to settle suggests that for them, as well as for the judge and the plaintiffs, the underlying matter of whether professional standards would be identified as constitutional minimums was the essential one. In this respect, as in others, the victory state officials claimed to have won in the appeals court was in fact a meaningful one.

[105] *Ruiz v. Estelle*, 679 F.2d at 1150.

Chapter 2

Promoting Innovation: The Politics of Federal Aid to Criminal Justice

"Crime will not wait while we pull it up by the roots," proclaimed Lyndon Johnson in March 1965, in a special message to Congress on crime and law enforcement. "The long-run solution to the view of crime is jobs, education, and hope. This is a goal to which our country is committed. But we should remember that not all crime is committed by those who are impoverished or those who are denied equal opportunity. In any event, we cannot postpone our responsibilities to act against crimes committed today."[1] Starting in what was still the optimistic springtime of the Great Society, President Johnson sought to defuse crime as a political issue by acknowledging the immediacy of the problem, and promising to develop near-term solutions. His crime initiatives were widely recognized as an effort to defuse a conservative backlash (which had been signaled, if not fully realized, in the resonance of Barry Goldwater's crime rhetoric during the 1964 presidential campaign). But within Johnson's White House, safe streets and crime control were also seen as a legitimate cause, and one more social goal for federal policy to promote. The modest initiatives launched at that time of LBJ's 1965 message—a small Justice Department grant program for police and other justice agencies, and a major presidential commission on law enforcement and criminal justice—

[1] "Special Message to the Congress on Law Enforcement and the Administration of Justice," 3/8/65, *Public Papers of the Presidents: Lyndon B. Johnson, 1965* (Washington: GPO, 1965), p. 265.

led within three years to a more massive commitment of funds, administered by the Law Enforcement Assistance Administration until the agency was closed down in 1982.

By the time of the closing down, LEAA was mostly the object of bleak humor, as was any lingering memory of the optimistic rhetoric surrounding its origins. The agency distributed, in total, some $7.5 billion, mostly in block grants to state-level planning agencies, and it retained the political support of some of its beneficiaries in law enforcement. The general impression of failure arose from both results (given the upward spiral, mostly uninterrupted, in overall index crime rates) and process (given the agency's reputation as a bureaucratic fiasco, generating endless red tape without conveying a consistent understanding of its own objectives). Few political leaders offered serious complaints when the Carter administration abruptly decided to cut the agency's funding out of its budget request. Yet one of the few was none other than Bill Clements, the hard-nosed, bull-headed Republican governor of Texas whose regard for federal domestic programs typically matched his level of esteem for personal political opponents. Clements sent a public letter of complaint to President Carter, privately urged candidate Ronald Reagan to support the program, and continued over the following years to attack the phase-out as an abandonment of federal obligations. "Those funds had enabled state and local communities to strengthen their response to crime," he insisted. "The abrupt withdrawal of federal support occurred at a critical period in our nation's fight against crime."[2]

[2] See letter, Gov. William P. Clements to President Jimmy Carter, 3/12/80, Box 5, Folder 38; unsigned memo addressed to Gov. Ronald Reagan (n.d.), Box 32, Folder 24; and quotation taken from Remarks Prepared for Governor William P. Clements, Jr., National Governor's Conference, Feb. 22, 1982, Box 41,

Studies of the strange career of federal aid to law enforcement conducted in the shadow of the LEAA experience based their unambiguously harsh judgments on the standards proclaimed by President Johnson and his immediate successors, or by leaders of the agency itself as they sought to affirm the value of their work.[3] Aside from the unrealistic hope of actually reducing the overall crime rate, LEAA had taken on such goals as improving the functioning of the criminal justice system and promoting local innovations in crime-fighting; but critics, citing the inconsistency of these priorities and the lack of influence of central planners over local agencies, generally agreed that the agency had accomplished little, even in these terms. But a more distant remove, away from the evaluative criteria of the agency itself or its contemporary critics, may allow for new views of its significance. Its impact on professionalization in criminal justice—one of its early and enduring stated goals—deserves consideration in historical perspective. I argue that the influence of federal aid on the development of law-enforcement professions was hamstrung at the outset by conceptual failures, particularly an inability to relate the state of the art in academic research to the practical tasks of law enforcement.

Without a credible, solid basis in an established science, professionalization in criminal justice (in any meaningful sense) was easily sacrificed to the priorities of state and local political leaders. But here, again, instead of sealing a diagnosis of failure, the

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Folder 15, all in General Counsel Records, 1979-1983, William P. Clements, Jr. Papers, Texas A&M University Libraries.

[3] See Malcolm M. Feeley and Austin D. Sarat, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration* (Minneapolis: Univ. of Minnesota Press, 1980); Richard S. Allinson, "LEAA's Impact on Criminal Justice: A Review of the Literature," *Criminal Justice Abstracts,* Dec. 1979, pp. 608-648; Robert F. Diegelman, "Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience," *Journal of Criminal Law and Criminology*, Vol. 73, No. 3 (1982) pp. 994-1011; and Alan R. Gordan and Norval Morris, "Presidential Commissions and the Law Enforcement Assistance Administration," in Lynn A. Curtis, ed., *American Violence and Public Policy: An Update of the National Commission on the Causes and Prevention of Violence* (New Haven: Yale Univ. Press, 1985), pp. 117-132.

prevalence of political influence should be a point of departure for new inquiry. In Texas, where broad social factors promoted a long-expected but gradual shift in the overall partisan orientation of the voting public, successive governors sought to use their control over federal grant funds to build constituencies among local officials in law enforcement and criminal justice and, ultimately, a broader public. Preston Smith, the first governor to administer the program, put it to use in a traditional way. But Clements' aggressive use of the issues around federal grant aid—all the more aggressive after Carter terminated the aid—shows that the program did, after all, promote innovation in some forms. Beyond his own immediate electoral priorities, Clements also deployed grant aid in ways that helped reshape the grass-roots politics of criminal justice and foreshadowed the revival of federal grant aid for targeted purposes. The eventual establishment of political supremacy by the Republican Party in Texas was advanced by these initiatives. The experiences endured by the victims of the Tulia drug sting are among the myriad smaller consequences.

The origins of federal aid to law enforcement within the Johnson Administration offer a case study in the role of social science research, not simply upon policy in an immediate sense, but on the structure of governmental institutions and the consequences of their flaws. Johnson's presidential crime commission, his legislative proposals for federal aid to law enforcement agencies, and the congressional response all led to the statute—the Omnibus Crime Control and Safe Streets Act of 1968—which set up LEAA and governed its granting procedures (which were then adjusted repeatedly over the years

by successive acts of reauthorization). Complaints about the agency generally cited its unwieldy, complicated structure (originally, instead of a single director, it was led by a "troika") and the limited supervisory authority granted in the enabling legislation. In fact, an explanation of LEAA's salient features goes back beyond the legislative history, to the arguments and assumptions about the etiology of crime that structured the choices perceived by the administration officials who drafted the original proposals. In the absence of scientific guidance pertaining to crime reduction methods, President Johnson's men were left to build an agenda on the principle of professionalization—an agenda which was inevitably overwhelmed in Congress by a rising tide of partisanship, conservative reaction, and the opportunistic politics of crime and punishment.

In his policy proposals and in his public rhetoric, Lyndon Johnson set out to capture the terms of the emerging debate over crime in the streets and to create a responsible middle-ground position. In his public statements he offered assurances of his commitment to maintaining local and state responsibility for crime control, and ritual disavowals of the idea of a national police force, together with bold pronouncements that put fighting crime, and reducing the fear of crime, high on the list of Great Society priorities. He would not be satisfied, Johnson proclaimed, with characteristic restraint, "until every woman and child in this Nation can walk any street, enjoy any park, drive on any highway, and live in any community at any time of the day or night without fear of being harmed."[4] But notwithstanding the President's hyperbole problem, another recurring theme suggests his sensitivity to the kind of expert knowledge he would

[4] "Statement Following the Signing of the Law Enforcement Act," 9/22/65, *Public Papers of the Presidents,* 1965, p. 1013.

ultimately need in order to deliver the promised solutions. This theme was his acknowledgement that crime was not only a function of impoverishment or a denial of opportunity (as he had occasionally suggested while defending his poverty program).[5] Some criminals were well off; moreover, most poor people were not criminals. At the first meeting of his crime commission, in September 1965, Johnson read a list of questions for the panel to answer, including "why one man breaks the law and another living in the same circumstances does not."[6]

Johnson's question unwittingly posed one of the fundamental challenges to the scholarship that guided the crime commission's work. The commissioners' assumptions were largely shaped by the classical strain theory of criminology, as developed by sociologists such as Robert K. Merton and adapted to the anti-poverty policymaking community by Lloyd Ohlin and Richard Cloward in their landmark book *Delinquency and Opportunity*. With far-reaching policy consequences, Ohlin and Cloward established as conventional wisdom the explanation of juvenile delinquency as a function of social setting, and specifically of juveniles' relative access to legitimate and illegitimate "structures of opportunity," depending on how their surrounding community was organized. Instead of an answer to Johnson's question, which would enable anticrime policymakers to focus on some deeper individualized root, the crime commission's report, with the help of Ohlin himself, offered an elaboration of the causes of crime in terms of opportunity theory. For crimes of violence, according to the report of the

[5] Johnson sensed that he had erred in his response to Goldwater's appeals to public fears, when he replied that his War on Poverty was simultaneously a war on crime. See Michael William Flamm, *"Law and Order": Street Crime, Civil Disorder, and the Crisis of Liberalism* (Ph.D. dissertation, Columbia University, 1998), p. 128.
[6] "Remarks to the members of CLEAJ," 9/8/65, *Public Papers of the Presidents*, 1965 (Book II), p. 983.

commission's task force on assessment of the crime problem (chaired by Ohlin), the leading age-group of those arrested was the 18-to-20-year-old cohort (followed closely by the 21-to-24-year-olds), while the 15-to-17-year-olds were the highest for burglaries, larcenies, and auto thefts.[7] The commission report correlated delinquency with urban slum settings, family dysfunction, and backgrounds of social and economic deprivation. Consequently, the report cited antipoverty social policy, targeting juveniles through their surrounding communities, as the most demonstrably plausible approach to the problem of crime prevention. "In the last analysis, the most promising and so the most important method of dealing with crime is by preventing it—by ameliorating the conditions of life that drive people to commit crimes and that undermine the restraining rules and institutions erected by society against antisocial conduct."[8] Also reinforcing the preventative importance of organizing a community's socializing institutions so as to head off delinquency—as opposed to reinforcing police firepower—was the commission's endorsement of labeling theory, which attributed high rates of recidivism to the "stigmatizing effects of the criminal justice system."[9]

Despite their intensive efforts, the ambitions of the crime commission staff were necessarily constrained by deadlines and by the existing state of the art in relevant fields of study. Ohlin later recalled that "the most important inputs of social science knowledge to the Crime Commission were probably (1) the documentation of the harmful consequences of existing practices and policies and (2) the suggestion of a variety of

[7] The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington: GPO, 1967), p. 56.
[8] *The Challenge of Crime in a Free Society*, p. 58.
[9] *The Challenge of Crime in a Free Society*, pp. 66-67.

persuasive theories and justifications for pursuing alternative ones."[10] What was lacking, among other things, were experimental findings that established the preventative effect of any particular policy alternatives. If this was true in the realm of antipoverty research, with its rich scholarly tradition, it was all the more so in what was then the much thinner literature on law enforcement and criminal justice agencies. The commission task forces that dealt with police, courts, and corrections were occasionally able to relate their recommendations to the goal of crime prevention—as with the correction task force's emphasis on the need for community-based alternative methods to reduce recidivism (given the pervasiveness of the "labeling" problem). Also, the science and technology task force dedicated a section of its work to devices which could reduce criminal opportunities, such as more secure car ignition mechanisms and better street lighting. But each of these task forces to some degree served pioneering functions, conducting surveys to collect basic information about the operations of their subject field, and identifying some of the most pressing research needs.

Given the President's commitment to finding ways of improving law enforcement, the findings of the police task force took on special urgency. In this case as in others, the task force recommendations occasionally pointed toward a possible impact on crime rates, but no research existed which could prove the relationship. Progress, if it came, would take trial, error, and time. The task force's emphasis on ways of improving police-community relations, while obviously informed by the urban riots and simmering inner-city tensions of the period, also followed from the undeniable fact that a hostile

[10] Lloyd E. Ohlin, "Report on the Preisent's Commission on Law Enforcement and Administration of Justice," in Mirra Komarovsky, ed., *Sociology and Public Policy: The Case of Presidential Commissions* (New York: Elsevier, 1975), p. 109.

public "adversely affects the ability of the police to prevent crime and apprehend criminals."[11] Also, the report cited speculations about the crime-deterring effect of officers visibly fulfilling community-service functions, such as traffic patrol, which arguably had little to do with enforcing the law.[12] But in the absence of hard information on anything police could do to head off crime, the task force concentrated on what its studies and surveys did offer—which was an array of opportunities to reorganize and rationalize existing police operations, management, and personnel. As its one experimental suggestion, the report endorsed the idea of redividing tasks and assigning personnel so as to allow for "team policing," in which a discrete unit of officers serving patrol, investigative, and community-service functions would work a single neighborhood together under a single supervisor.[13] But the other recommendations mostly aimed at upgrading personnel, through means such as competitive salaries, higher-education requirements, better training, promotions based on ability, and statewide commissions on standards. While arguably innovative in a sense, these recommendations basically amounted to an endorsement of well-weathered notions of professionalization advanced by generations of police reform advocates.[14]

As rates of violent crime continued their rapid rise in 1965 and 1966, and as urban riots and protests tore at the civic fabric, Johnson felt increasingly reliant politically on the prospect of serious proposals from his crime commission. But over the same period, the commission members and staff became, if anything, more circumspect about what

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[11] The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (Washington, GPO, 1967), p. 145.
[12] *The Challenge of Crime in a Free Society*, pp. 97-98.
[13] *Task Force Report: The Police*, p. 53.
[14] See Samuel Walker, *A Critical History of Police Reform* (Lexington, MA: Lexington Books, 1977).

they could achieve. In early 1966, Nicholas Katzenbach, the U.S. attorney general and chairman of the commission, having been prompted by his close colleague and crime commission staff director (and future Harvard Law School dean) James Vorenberg, complained about a reworked draft of the President's 1966 crime message. Noting some new language that had been substituted for the Justice Department's carefully constructed rationale for the President's legislative proposals (which were minor), Katzenbach said the White House "speaks rather hysterically about crime and treats the eight point plan as though it, by itself, would provide solutions. But they will not." Portraying the plan as a new departure, rather than as part of a consistent strategy, "risks serious questions. Not only will people ask what we have been doing during the past year, but they will ask the same question next year when the crime rate goes up again. It makes no sense for the President annually to engage in an all-out war on crime and annually lose."[15]

Vorenberg, the indispensable man who orchestrated the entire staff effort for the crime commission, was similarly cautious about what the commission could hope to accomplish. In July 1966, shortly after the Supreme Court handed down its landmark ruling in *Miranda v. Arizona*, commission member (and then-president of the American Bar Association, later Supreme Court Justice) Lewis Powell wrote to Vorenberg to complain about the ruling and, more importantly, the commission's failure to take a stand publicly on the consequences of the Court's new restrictions on police interrogation.[16] Vorenberg, in replying, made it clear that he also disapproved of the Court's ruling, in

[15] Memo, Nicholas deB. Katzenbach to Joseph Califano, 2/25/66, "Joseph A. Califano Jr. Folder 1, 1966," Box 15, Papers of Nicholas deB. Katzenbach, LBJ Library.
[16] Letter, Lewis F. Powell, Jr. to James Vorenberg, 7/6/66, "Justice—National Crime Commission," Box 11, Papers of Nicholas deB. Katzenbach, LBJ Library.

part because it preempted state legislative efforts to codify civil procedure.[17] But he also cited the sensitivity of the commission's task of educating the public, managing its expectations, and carefully selecting its subjects of emphasis. Ultimately, he suggested, this was because the commission in the short run had so little to offer:

> There is no single question to which the Commission staff . . . have devoted more attention than seeking early and viable remedies. We have some specific ideas and proposals for short-run measures and are even trying our hand at a separate chapter combining these, but I do not believe that this will be the major contribution of our work. While there are far too few able people in this field, there are some; and the sad fact is that if there were relatively clear and early answers which would dramatically affect the amount of crime, they would have been put into effect. In fact, one of the things that has struck me most in my work in the last two years is what a complex, slow process it is to devise and put into effect changes which are likely to make a significant impact on crime.[18]

Even as it elicited Vorenberg's acknowledgement of skepticism, the *Miranda* decision further deepened the President's political predicament. The ruling proved politically explosive in an environment in which the Court's preceding rulings on admissibility of station-house confessions (the *Mallory* and *Escobedo* cases) were already the subject of growing controversy. The ruling represented the views of Johnson himself no more than that of the Justice Department, but the Court's growing ranks of critics generally found LBJ guilty by association.

Thus by the fall of 1966, as the crime commission settled upon its recommendations and wrote its reports, the national debate over crime policy was already

[17] Letter, James Vorenberg to Lewis F. Powell, Jr., 8/1/66, "Justice—National Crime Commission," Box 11, Papers of Nicholas deB. Katzenbach, LBJ Library. Vorenberg himself had contributed greatly to these efforts through his work on the American Law Institute's model code of pre-arraignment procedure. See Vorenberg and Paul M. Bator, "Arrest, Detention, Interrogation, and the Right to Counsel: Basic Problems and Possible Legislative Solutions," *Columbia Law Review* 66 (1978), pp. 62-78.
[18] Letter, James Vorenberg to Lewis F. Powell, Jr., 7/22/66, "Justice—National Crime Commission," Box 11, Papers of Nicholas deB. Katzenbach, LBJ Library.

degenerating into attacks on the Supreme Court and on liberal permissiveness. Meanwhile, Katzenbach, Vorenberg, and other officials from the White House and the Justice Department began the task of turning the crime commission's recommendations into the President's 1967 legislative package. Joseph Califano, Johnson's chief domestic policy aide, assigned the Attorney General to chair a special task force and to develop a detailed outline of legislative proposals. (Shortly afterwards, Katzenbach left the task force and the Justice Department to serve as under secretary of state, and the new Acting Attorney General, Ramsey Clark, took over his duties.) The task force report, finished and submitted in November, set forth a list of proposals led by an operational grant-in-aid program which would be used by local agencies for "innovations in the operations of criminal justice," examples of which included education and training for police, studies of centralized court administration, and community-based corrections. This was similar, to the work of the small grant agency Johnson had set up in 1965, though on a much larger scale. But to promote what it called the "institutionalization of innovations," the task force went on to recommend that federal aid be conditioned upon the submission of program plans by a state criminal justice planning agency with the authority to oversee the administration of programs by local grant recipients. The federal program would be administered by a new division-level agency within the Department of Justice.[19]

The impetus for defining the administration's program in terms of planning mechanisms and structures aimed at fostering the generic goal of innovation seems to have come mainly form Vorenberg, who understood it as the way in which the federal

[19] "Proposed Legislation on Federal Support to State and Local Law Enforcement and Criminal Justice Systems," folder "Report of the Task Force on Law Enforcement and the Administration of Justice (Tab B)," Legislative Background—Safe Streets and Crime Control Act, 1968, Box 1, LBJ Library.

government could best stimulate reform and professionalization. Califano, attuned to the White House's political needs, forced some changes in the plan. Perhaps with the idea of firming up support from the administration's urban constituencies, he took out the state planning agency requirement for grant applicants.[20] He also appealed to Vorenberg and to Charles Haar (an assistant housing secretary, and architect of the administration's urban grants programs) to come up with a "Safe Streets and Homes" bill, or a separate title attached to the task force proposal. Understanding what Califano was getting at, Haar outlined a series of demonstration grants aimed at such things as new technology for police departments and new street lighting and alarm systems. "This Act sees crime from the point of view of the victim, be he central city grandfather or suburban matron," wrote Haar in his proposal. "Unless liberalism can show an eagerness to cope with this problem, it will become a notable victim of crime in the streets."[21] Vorenberg submitted his own draft, but added mordantly that "we probably know even less about most of the results that can be expected from the programs which would be included in such a package than we do about the proposals for planned upgrading of the criminal justice agencies (about which we know little indeed)." Furthermore, even if it did result in crime reductions, Vorenberg said, "it seems most unlikely that, even at very high levels of spending, it would offset the predictable increase in crime in the next five to ten years, which will result from increases in the 15 to 25 age bracket, racial shifts within that

[20] See Meeting Notes, 12/10/66, folder "Gaither's Notes of Crime Program Meetings," Legislative Background—Safe Streets and Crime Control Act, 1968, Box 1, LBJ Library.
[21] Memo, Charles M. Haar to Joseph Califano, 12/8/66, folder "1966-67 Task Force on Crime—II," Legislative Background—Safe Streets and Crime Control Act, 1968, Box 1, LBJ Library.

bracket, and increased urbanization. If the public develops expectations of dramatic and early change, it will be disappointed."[22]

Johnson's concerns were more immediate. He did not approve a package of specific demonstration grants, as Haar had suggested, but the final version did reflect Califano's efforts to widen its appeal. On February 6, 1967, LBJ submitted his third special message on crime to Congress, together with a legislative package headlined by a Safe Streets and Crime Control Act. The act proposed a new program to offer cities and states grants for planning, program implementation, and research and development, to be administered (like the existing small program) by the Department of Justice. According to the department's official history, under the proposed structure "the Federal Government would seek to create and guide the allocation of new resources to law enforcement, consistent with the Nation's historical conviction that law enforcement must continue to be primarily a State and local responsibility."[23] The message emphasized key themes from the crime commission's report (which was just then being published): the importance of crime prevention (using examples of technology, and the need to overcome poverty), the fairness of the criminal justice system, and the desperate need of the system for "better-trained people."[24] A month later, Ramsey Clark appeared for the administration before the Criminal Laws Subcommittee of the Senate Judiciary

[22] Memo, James Vorenberg to Joseph Califano, 12/8/66, folder "1966-67 Task Force on Crime—II," Legislative Background—Safe Streets and Crime Control Act, 1968, Box 1, LBJ Library.
[23] "Omnibus Crime Control and Safe Streets Act of 1968, Titles I-III," p. 3, Administrative History of the Department of Justice, Vol. I, Part 1, Box 1, LBJ Library.
[24] "Special Message to the Congress on Crime in America," 2/6/67, *Public Papers of the Presidents*, 1967, pp. 134-145.

Committee, in the first of a series of hearings in what promised to be a grueling legislative struggle.

Over the months that followed, the administration lost its key battles in both chambers of Congress over the shape and contents of its crime bill. In the House of Representatives, after the bill was reported intact through the Judiciary Committee, Republican leaders successfully amended it on the floor, taking out the Justice Department's granting authority and substituting pure block grants to states, allocated by population. Using the planning grants, states would create state-level and regional planning agencies which would then pass on block-grant funds to local applicants based on comprehensive statewide plans. The administration and its supporters hoped to reverse this outcome in the Senate, but were outmaneuvered by Judiciary Committee chairman John McClellan, who added provisions purporting to overturn the *Miranda* ruling and expanded police departments' wiretapping authority, then helped pass the block grant amendment on the Senate floor. Then, following the assassination of Robert F. Kennedy, the House passed the revised Senate version intact, leaving the measure to be signed, reluctantly and quietly, by President Johnson.[25] In both chambers, on the block-grant amendments Republicans voted virtually unanimously in combination with Southern Democrats to remove the administration's control over program grants. While the outcome reflected a perceived level of public fear and anger, it also represented the resurgent influence of political patterns long entrenched in Congress up until the passage of civil rights and Great Society bills. The traditional coalition of Republicans and

[25] Public Law 90-351 (H.R. 5037), The Omnibus Crime Control and Safe Streets Act of 1968, 90th Congress (Washington: GPO), 6/19/68.

southern Democrats was pulled back together, especially by indignation at the Warren Court. Also, state governors of both parties almost unanimously demanded their own discretion over federal funds, and their national organization poured resources into the congressional struggle.[26]

Against these institutional forces, the Johnson administration, in its waning days, offered a proposal which was intended to address the public fear of crime, but in fact offered little more than the prospect of eventual improvements in the branches of the criminal justice system, to be supervised by federal officials. The administration's legislative agenda overall included other recommendations by the crime commission, much of it in different pieces of legislation (such as further grants for juvenile delinquency programs, to be administered by an established office in the Department of Health, Education, and Welfare). But the signature proposal all too obviously reflected a failure on the part of the commission to meet the needs of the President—to transcend the prevailing wisdom and to find the near-term answers to questions Johnson had posed at the beginning.

On the Texas Tech University campus, in the lobby outside the university's archival collections, an exhibit in a glass display case commemorates the career of Preston Smith, the first and only West Texas native to win the state governor's office.[27]

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[26] My sketch of the legislative outcome relies on Barry Mahoney, *The Politics of the Safe Streets Act, 1965-1973* (Ph.D. dissertation, Columbia University, 1974); Michael William Flamm, *"Law and Order"*; journalist Richard Harris' coverage in the *New Yorker*, later republished as *The Fear of Crime* (New York: Praeger, 1969); Feeley and Sarat, *The Policy Dilemma*, chapter 2; and the Administrative History of the Department of Justice.

[27] Smith was actually born in Williamson County, outside Austin, in 1912, but was moved with his family to a farm near Lamesa, south of Lubbock. Reminiscing about the move in later years, he recalled that his

Forgotten in most of Texas long before his death in 2003, Smith is still revered in Lubbock; the airport was recently renamed in his honor, and a tall bronze statue of him stands facing the university administration building (with his back toward the rest of the campus). Together with artifacts of his career, the display behind glass lists some of his accomplishments as governor. Near the top of the list is his distribution of federal crime-fighting funds to local law enforcement and justice agencies throughout Texas.

The distance between the likes of James Vorenberg (or even Ramsey Clark, himself a Texan) and Preston Smith shows the extent of the consequences of rejecting federal discretion over grants-in-aid and substituting block grants to states. Many individual grant recipients would have been the same, in either case; but the underlying orientation of the program was entirely different. Instead of being vehicles for the "institutionalization of innovations," as directed by federal Justice Department staff, the state planning agencies served as pure reflections of the political forces within states which had an interest in substantial outside grants for criminal justice. Among these forces were the governors who appointed the planning committees. As politicians recognized from the beginning, the flow of funds for criminal justice represented at least a potential force for promoting political change in its own right.

With Texas still in the early stages of a long-anticipated but stubbornly slow shift in its overall partisan leanings, sources of outside grant funds under the control of the

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family's packed-up Model T had to be driven in reverse up a steep incline leading onto the high West Texas prairie. For his own part, Smith as a college student traveled the 100-mile distance between home and Texas Tech on foot. Interview with Prof. Donald R. Walker, Department of History, Texas Tech University, July 2004. Also see interview with Preston Smith, 2/6/75, Preston Smith Oral History Collection, Southwest Collection/Special Collections Library, Texas Tech University; Sam Kinch, Jr. and Ben Procter, *Texas Under a Cloud* (Austin: Jenkins, 1972), pp. 52-62, and Charles Deaton, *The Year They Threw the Rascals Out* (Austin: Shoal Creek Publishers, 1973), pp. 59-63.

governor's office were meaningful political assets. With fear of crime having become a pervasive public concern, and "law and order" becoming a pervasive political theme, federal aid to criminal justice became a potentially valuable asset to leaders of both parties. The different approaches of successive governors largely followed from the tendencies of particular personalities but also, to a degree, reflected the different constituencies they represented, or targeted.

As the first governor of Texas to inherit the potential political asset of federal aid to criminal justice, Preston Smith ultimately established the tradition of seeking the political dividends. While he realized few significant gains from the effort, this reflected not so much the irrelevance of the issue so much as the irrelevance of Smith himself, by then, due to other circumstances. Smith's ability to win the governorship to begin with is revealing of the condition of Texas Democratic Party politics in the fading years of the party's dominance. By the 1960s the party was irreconcilably split between liberal and conservative wings. (Lyndon Johnson was able to maneuver into a position of power over the party, as an intended base for his presidential plans, but since he stood in the middle without representing either side fully, his control remained precarious.) John B. Connally, LBJ's personal (but not ideological) protégé and Smith's immediate predecessor as governor, sought to reinforce the dominance of the conservative faction by building new ties between business interests and an expanding state government. Effective as he was in managing a modernized spoils system, Connally and his allies were unable to develop a successor within the party who could win the endorsement of

Democratic primary voters.[28] Smith had won the lieutenant governor's office on the strength of solid support in West Texas and an ability to appeal to rural voters statewide, who still constituted a large share of the party primary electorate. His willingness to announce his 1968 candidacy for the governorship early on, before Connally's withdrawal, gave him a head start on his competitors for conservative support, which he then consolidated in prevailing over liberal Don Yarborough in the primary runoff.

As Connally's successor, Smith appeared as a kind of personal and political throwback. The personal qualities that emerged during his West Texas upbringing—such as his mastery of a homely kind of gregariousness—deepened his affinity with his regional and rural supporters while limiting his appeal to others.[29] His roots lay in isolated rural poverty but, as he later recalled, he was inspired to dream of becoming governor of Texas by reading political newspapers delivered along the postal routes.[30] In

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[28] Connally did hand-pick an intended successor, Dallas businessman Eugene Locke, whose well-funded media campaign actually managed to make the phrase "Eugene Locke should be governor of Texas" into a catchy jingle that filled commercial breaks statewide. In later years Smith gleefully enjoyed singing the tune himself. Other candidates in the race, such as state attorney general John Hill and Uvalde ranching scion Dolph Briscoe, contended unsuccessfully for the conservative support Smith was able to attract. See John R. Knaggs, *Two-Party Texas: The John Tower Era, 1961-1984* (Austin: Eakin Press, 1986), pp. 118, 125.

Connally's career is described in his own autobiography (*In History's Shadow: An American Odyssey*, written with Mickey Herskowitz [New York: Hyperion, 1993]) and two other books (Ann Fears Crawford and Jack Keever, *John B. Connally: Portrait in Power* [Austin: Jenkins, 1973] and James Reston, *The Lone Star: The Life of John Connally* [New York: Harper & Row, 1989]). But the most useful political interpretation, despite being dated by its preoccupation with Connally's presumed viability as a presidential candidate, remains Paul Burka's "The Truth About John Connally," *Texas Monthly*, November 1979.

[29] Reminiscing about covering the Capitol, one newsman said, "Preston was just as common as an old shoe!" Interview, Glen Castlebury, 1/11/74, Preston Smith Oral History Project, Southwest Collection/Special Collections Library, Texas Tech University.

[30] Specifically Smith was inspired by the *Ferguson Forum*, the longtime organ of "Farmer Jim" Ferguson, which maintained a substantial rural following for Jim and "Ma" Ferguson for several decades. Aside from the heroic example, Smith seems to have taken little of substance from the legacy of "Fergusonism." See Lewis L. Gould, *Progressives and Prohibitionists: Texas Democrats in the Wilson Era* (Austin: Texas State Historical Association, 1992) and Norman D. Brown, *Hood, Bonnet, and Little Brown Jug: Texas Politics, 1921-1928* (College Station: Texas A&M University Press, 1984).

Austin, where he represented a West Texas district in the Legislature, his country ways and high ambitions inspired some amusement, but his particular base of support (along with his attention to other necessary rituals, such as dedicated campaigning for trade association endorsements) eventually proved effective in his rise to statewide office.[31] In addition to reflecting the persistence of traditional party constituencies, Smith's success exposed the image of modern corporate leadership resting on effective political management—an image embodied by Connally—as a façade. Connally's own dim view of his successor, however, took into account the disconnect between Smith's capabilities and the government over which he would preside.[32]

The early years of federal aid to criminal justice in Texas reflected the narrow circle of executive-branch policymaking, as well as a lack of central direction aimed at integrating the workings of the various branches of justice included within the circle. Upon taking office in early 1969, Smith was all but unaware of the new grant program, and with a contentious legislative session already under way, he left day-to-day administration of the program entirely in the hands of his staff and appointees.[33] Some of

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His early adult life may have reinforced the hard experiences of his youth. Living on a frayed shoestring, he worked his way through Texas Tech while running a filling station, and, after seizing an opportunity to set up a movie theater near the college campus, he ultimately established himself as the owner of a regional cinema chain, which gave him the means to pursue his political dreams. Even as a statewide politician, he never abandoned, or transcended, the regional homeliness. Interview with Prof. Donald R. Walker, Department of History, Texas Tech University, July 2004.

[31] See interviews with Bo Byers, 8/22/73, and Stuart Long, 5/17/74, Preston Smith Oral History Collection, Southwest Collection/Special Collections Library, Texas Tech University.

[32] According to Paul Burka, Connally "warned his friends not to support Preston Smith for governor, as some had pledged to do if [he] did not run again; Smith didn't know how to run the system, he told them; he would be too lax, there would surely be a scandal. And sure enough, there was." See Burka, "The Truth About John Connally."

[33] See interview, Harold Dudley, 6/13/73, Preston Smith Oral History Collection, Southwest Collection/Special Collections Library, Texas Tech University. Also see James Robert Short, *The Texas Criminal Justice Council: A Chronicle and Analysis* (M.A. report, University of Texas at Austin, 1973), p. 52. A careful survey of the CJC meeting minutes from October 1971 to January 1973 shows no incidences

the necessary preparations for Texas' participation in the aid program had begun under Connally, such as the creation of a Criminal Justice Council (CJC) within the governor's office, which would recommend program grants (for the governor's final approval) and perform the state-level planning functions required by the federal act.[34] But, especially early on, the complex requirements of the grant program placed nearly impossible demands on the newly organized council and its staff—which also suffered from administrative problems of its own. The first application for the CJC's own planning grants, the CJC's consideration of individual program grant applications, and the first statewide plans for allocation of block-grant funds all had to be accomplished within a few months, under extreme deadline pressure, and without the benefit of a functioning executive director (since Connally's initial appointee fell ill and had to resign and be replaced).[35] One result of these early difficulties was that no "comprehensive planning"—meaning planning based on a perspective of the criminal justice realm as a integrated whole, and coordinating programs across its different branches and specialties—took place. Separate planning directors handled the separate branches of the

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of Gov. Smith exercising his prerogative to disapprove program grants recommended by the council. See Box 1989/057-1, Records of the Criminal Justice Division, Office of the Governor, Archives and Information Services Division, Texas State Library and Archives Commission.

Gov. Smith did issue an executive order in 1971 that reorganized the council's structure and membership, but this was at the suggestion of a subcommittee of key council members aimed at facilitating the handling of the program as available funds expanded and program applications increased. See remarks by Gov. Smith to the Criminal Justice Council, 10/8/71, Box 564, Folder "Speech Material Prepared for Gov. Smith," Texas Criminal Justice Council (1969-1972), Papers of E. Preston Smith, Southwest Collection/Special Collections Library, Texas Tech University.

[34] Michael Vance Powell provides a careful analysis of the structure, composition, and staff functions of the Criminal Justice Council in *The Block Grant for Crime Control in Texas, 1968-1970* (M.A. thesis, University of Texas at Austin, 1972), pp. 21-30.

[35] Leonard Blaylock's note to Vernon McGee tendering his resignation as CJC director, 5/28/69, is in Box 527, Folder "Criminal Justice Council," Program Development (Oliver-McKee) Correspondence, E. Preston Smith Papers, Southwest Collection/Special Collections Library, Texas Tech University.

criminal justice system (law enforcement, courts, and corrections) independently, and even the appointment of a new executive director failed to influence their work.[36]

Without firm leadership, or even guidance, from above, the decision-making process among CJC staff members, and the council itself, amounted to a struggle among staff and councilors representing particular interests. Smith's council-member and staff appointments reflected a clear assumption that the planning process would represent institutional interests rather than the views of unaffiliated citizens. Nine of the 21 seats on the CJC were reserved *ex oficio* for the heads of the state agencies involved in criminal justice (such as the Department of Public Safety, the Attorney General's office, TDC, the Texas Youth Council, and so on). Two of the three program directors had recently been employed by agency chiefs who now sat on the council.

The CJC's funding history for the first three years under Smith, up to the end of fiscal 1971, reflected the inevitable logrolling and self-dealing among the state and local agencies who carried some degree of weight on the council. The council's action grant list for fiscal 1969-1971 (combined, for the purposes of its press release, with an LEAA discretionary program involving law enforcement in Dallas) totaled some $25 million.[37] The action grant list did not contain its own subtotals by section, but its listed grants included some $2.1 million for peace officer training and professional college education;

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[36] See James Robert Short, *The Texas Criminal Justice Council*, pp. 59-71. Short and Powell also provide invaluably clear first-hand accounts of the continuing administrative struggles, which included endless disputes with LEAA regional officials over "special conditions" attached by the agency to its approval of the state criminal justice plans during the first two years, and the state's disputes of the regional officials' criticisms.

[37] Letter, Joe Frazier Brown, executive director, Criminal Justice Council, 12/3/71, in *Progress of Action Grant Funding in Texas by the Texas Criminal Justice Council and by the Law Enforcement Assistance Administration in accordance with the Omnibus Crime Control and Safe Streets Act of 1968, as amended, from the Inception of Funding in November 1968 to September 30, 1971* (Austin: Criminal Justice Council, 1971).

$2.7 million for prosecution, court activities, and law reform; $2.15 million for programs in corrections, including adult probation services; $650,000 for police-community relations units; and $3.1 million for facility construction, which included $700,000 for an academic building for the criminal justice program at Sam Houston State University (whose president was another of the original *ex oficio* members of the CJC).[38] Other relatively large portions of the total budget went toward communications and database programs that were identified as building blocks of a comprehensive Texas Criminal Justice Information System. Grants to law enforcement took a predominant share of funds over the first three years, but as total funding levels grew, courts and corrections were gaining larger slices of the pie.[39] In the first two years the council approved roughly $250,000 in grants to local governments for riot control equipment, which was mostly discontinued as a category in the third year.

The overall picture is of an array of state and local agencies carving up the grant money so as to attend to those leading institutional priorities for which legislated appropriations were, for whatever reason, not already available. A few of the grants that council staff and members approved were for programs actually reflecting politically progressive views about criminal justice, such as an $18,000 contribution to the Texas State Bar for a project on revision of the state penal code (to be discussed here in another chapter). The grants for corrections included curriculum development for continuing

[38] The funding totals are my compilations of the listed grants within the sections of *Progress of Action Grant Funding* (1971).

[39] Law enforcement captured 77.7% of the $1.3 million in grant funds provided in fiscal 1969, but was down to 50.4% of the $19.2 million total in fiscal 1971. Michael Vance Powell, who sat in on the bargaining among the program directors over the statewide plan for the first half of fiscal 1970, observed that "it was believed by the executive director and others on the staff that too little money had been spent on prosecution and court matters during fiscal year 1969." See Powell, *The Block Grant for Crime Control in Texas*, p. 44.

education and doctoral programs at Sam Houston State, management seminars for TDC administrators, service improvements and new rehabilitative services in several local probation departments, and two halfway houses. Approval of these line items supports the impression that certain state agency leaders (such as Beto and Estelle at TDC) sympathized to a degree with alternative approaches in their fields, and were never as resistant to progressive change as many of the old-fashioned legislators who had long supervised their biennial budgets. But ambitious notions of progress, if they came at all, could be expected to arrive slowly. Meanwhile, grants for most forward-thinking programs not directly tied to key institutional priorities amounted to crumbs. The total funding for halfway houses statewide was $48,435. Assistance to district attorneys' offices over the three years totaled $1.1 million (including $100,000 for the salary of the executive director of the statewide prosecutors' association), but the category for grants for public defenders included a single grant of $27,214. One grant for $7,371 was the total effort for recruitment of minority police officers. The statewide plan included categories for improvement of parole services, and police offices for processing citizens' complaints, but no grants were made.

With no particular ambition to reshape criminal justice, but with an image to maintain and a record to defend, Governor Smith used his discretion over distribution of federal aid in ways that were politically sensible, if not imaginative. He intervened sparingly in the Criminal Justice Council's work. He did indicate his own interest in steering greater funds into drug abuse and narcotics control, and in January 1970 he ordered the Council to prepare a plan for drug abuse treatments (which was funded to the

tune of $1.2 million over the following two years). In at least one case he appears to have intervened to steer a contract toward a campaign supporter.[40] But mostly he kept his distance from the council's internal workings, and especially from its troubled dealings with LEAA officials.[41] As the program grew larger, Smith's public schedule increasingly consisted of appearances announcing the award of individual program grants. Some of Smith's own aides took a condescending view generally of his inaction, seeing it as passivity.[42] A more generous view might allow for Smith's homespun shrewdness. For the Governor, approving, issuing, and announcing the grant awards was a way of building up goodwill, especially with the public audience for the press coverage. Making the CJC and its staff the venue for the inevitable disputes between competing interests in criminal justice effectively contained the disputes. For the Governor to become embroiled directly in the carving-up process would have generated grievances and clouded his image as a benefactor to local criminal justice.

By 1971 he needed all the good public relations he could get. Along with other leading figures, Smith was implicated in allegations by the SEC in its lawsuit against Houston financier Frank Sharp, who stood accused of bribing lawmakers by loaning them money to buy his bank stock and then artificially inflating the share values. Smith was

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[40] The grant award (for part of the statewide law enforcement communications system) was to a Houston engineering firm, that had given campaign contributions to Smith. The council staff was known to have recommended contracting with another firm, but the Governor exercised his power of final approval to reverse the decision. See George Kuempel, "Smith Backer Wins $250,000 Grant," *Austin American,* 4/22/71. The critical coverage appears to reflect the simultaneously unfolding (though unrelated) Sharpstown scandal. The story does not seem to be part of a frequent pattern of similar revelations.

[41] Michael Vance Powell observes that while the council's funding decisions were always identified as recommendations, "in practice, however, neither the Governor nor any of his top assistants routinely reviewed the council's 'recommendations,' and the 'recommendations' stood as final decisions.' See *The Block Grant for Crime Control in Texas*, p. 25.

[42] For one example see interview, Larry Teaver, 6/6/73, Preston Smith Oral History Project, Southwest Collection/Special Collections Library, Texas Tech University.

not indicted, and only three individuals (including the speaker of the Texas House) were ultimately tried, but practically all of the leading elected officials and other power brokers in Austin stood convicted by public opinion.[43]

Convinced of his innocence and seeking vindication, Smith unexpectedly embarked in late 1971 on a quixotic campaign for reelection to a third term. Faced with a crowded field of opponents, one of whom (Briscoe) commanded the leading position as both an outsider and a conservative, Smith pursued a different campaign from his previous ones, running largely on his record of social programs and emphasizing those (health care services and criminal justice) for which he had obtained federal grant funding.[44] A substantial (but short-lived) dip in the rate of index crimes in the four largest Texas cities in the first half of 1971 gave Smith the opportunity to claim credit on behalf of the aid program. In an introductory letter to the compiled list of action grants for the first three fiscal years, council executive director Joe Frazier Brown cited the dip in the crime rate and somewhat rashly tied it to the action grants. "Many such projects are designed for long-range effect," Brown acknowledged. "However, some of those designed for more immediate results, and some early maturing long-range projects, apparently have had a direct effect on the incidence of crime in Texas."[45] Smith's

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[43] Smith had called a special session in 1969 to allow the passage of bank deposit legislation that would benefit Sharp. He actually then vetoed the legislation after it was pushed through, which was later cited as a reason why he avoided being indicted, but his record of business dealings with Sharp tied him tightly to the scandal. Sam Kinch Jr.'s *Handbook of Texas* entry on the "Sharpstown Stock-Fraud Scandal" neatly summarizes the affair and its broad short-term effects. The typical sources on this affair are two dusty but entertaining period pieces of political journalism, Sam Kinch, Jr. and Ben Procter, *Texas Under a Cloud* (Austin: Jenkins, 1972) and Charles Deaton, *The Year They Threw the Rascals Out* (Austin: Shoal Creek Publishers, 1973).

[44] See press release containing Smith's speech announcing re-election bid, 11/19/71, in Folder "Speech Material," Box 564, Preston Smith Papers.

[45] Letter, Joe Frazier Brown, *supra* note 37.

campaign echoed this claim through the primary election, and the governor used several local grant announcements as campaign stops.[46] At the last scheduled Criminal Justice Council meeting before primary day, he gave a speech praising the council's record, playing up some of its achievements (such as the law enforcement communications network), citing a few of his own priorities (such as multi-county jail facilities, a priority for rural counties), and urging his appointed council members to "serve as a two-way communication link between the state planning agency and the communities you represent" (which seems a decently subtle appeal for reinforcement of his campaign theme).[47]

Smith's campaign was doomed from the beginning, and in the final results in April he finished in fourth place with roughly 13% of the vote. As he receded into obscurity, however, the importance of his handling of criminal justice grants arguably became more visible, as the display case suggests. His precedents included not simply the distribution of grants to local beneficiaries but also the creation, in a sense, of a new politics of criminal justice at the state level. Others would later build in more imaginative ways upon Preston Smith's creation.

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[46] Examples include the "Year End Report" released by the Governor's Office, December 1971; Smith's remarks at the formal opening of a police department building in Port Arthur, 3/25/72, citing construction grant funding obtained from LEAA, and his remarks to the Eastland County Law Enforcement Association, 3/24/72, surveying the record of program grants, all in Folder "Speech Material," Box 564, Preston Smith Papers; and numerous newspaper stories from the primary campaign including "Smith Will Stress Crime Prevention," *Houston Chronicle*, 2/11/72 (describing address to annual crime prevention week luncheon of the Exchange Club of Houston); "Anti-Crime Program Pushed by Gov. Smith," *Dallas Morning News*, 2/11/72 (reporting on Smith's announcement of LEAA discretionary grants for Dallas); and "Governor Stresses Crime Drop," *Houston Post*, 3/10/72 and Stewart Davis, "Smith Reports Crime Drop," *Dallas Morning News*, 3/14/72 (both reporting on Smith's March 10 remarks to the Criminal Justice Council meeting).

[47] Remarks of Governor Preston Smith to the Criminal Justice Council, 3/10/72, Folder "Speech Material," Box 564, Preston Smith Papers.

"I don't want these drug pushers in Texas. I don't want them peddling their junk here, and we're going to put them where they belong—in jail!" Blunt, plain-spoken Governor Bill Clements, speaking in April 1982 to an awards dinner in Fort Worth, undoubtedly paused for the cheers.[48] During his two terms in office, the first Republican governor of Texas since Reconstruction was also the first one to make the perennial theme of fighting crime serve the cause of partisan change and the organization of new public constituencies. The threat of drugs and "drug pushers" was a constant refrain. The use of discretionary funds, to back up the calculated plain speaking, was a valuable tool.

In his willingness to put the prerogatives of incumbency to political use, Clements actually followed in the footsteps of his predecessors, though perhaps more vigorously. He inherited what was now the Criminal Justice Division of the governor's office, still channeling federal block grants into local program grants across the state. Like his immediate predecessor, he also invested his political capital in an anticrime legislative agenda that featured stricter sentences and new powers for law enforcement. But unlike any of his predecessors, he put the two pieces together—using the grant funds he controlled not just to fund an agency or implement a program directly, but to actually build a public campaign (the Texans' War on Drugs) with both legislative and broader political goals.

Circumstances ended up testing Clements' ability to improvise. When the federal government abruptly terminated its support for law enforcement grants, it threatened the

[48] Remarks Prepared for Gov. William P. Clements, Jr., Safety Council of Fort Worth 30th Annual Awards Dinner, Fort Worth, Texas, April 30, 1982, in Box 41, Folder 14, General Counsel Records, 1979-1983, William P. Clements, Jr. Papers, Texas A&M University Libraries.

future flow of discretionary funds to projects such as the continuing war on drugs. Demonstrating the importance of maintaining the flow, Clements proposed to replace the lost federal funds with additional state ones and incorporated the proposal into his anticrime agenda. Less successfully, as his political purposes became clear, he fought to maintain his own sole discretion over the funds. But his groundbreaking efforts, reflecting the motives and fixations of a thin slice of the elite public, ultimately validated the potency of antidrug fervor as a political force. In his later term in office, despite his greater preoccupation with prison crowding and construction efforts, Clements would continue to find new ways of using grant funds to wage drug wars and criminal-justice politics.

Political innovation may not have been expected of someone who prided himself on his lack of certain political skills, but Clements as governor brought some of the advantages of an outsider's perspective. For a Republican to win high office in Texas was by itself a remarkable (albeit long-awaited) act of innovation. As a novice candidate and, after 1978, an unexpected governor, Clements cultivated a persona that lent itself all too well to his crime-fighting themes once he began developing them. His Highland Park upbringing was not particularly humble, but he nevertheless spent enough time as an oil-field roughneck to appear convincingly self-made as a drilling-rig magnate.[49] As a member of the Dallas business elite in the 1960s and 1970s, he seems (at least in retrospect) slightly anachronistic, belonging more to the generation of R. L. Thornton and

[49] My interpretation emphasizes different themes, but necessarily relies on Carolyn Barta's *Bill Clements: Texian to his Toenails* (Austin: Eakin Press, 1996), which appears very likely to remain the standard biography.

other, similarly rough-hewn (but self-styled) leaders of the Dallas business oligarchy.[50] Notwithstanding his lack of experience as a candidate, he calculated that his no-nonsense manner, as well as his experience and prestige as a businessman and his abundant self-confidence, would serve him well in elective politics.[51] In fact, he and his view of his own office were indelibly marked by his Dallas background—and specifically the influence of the distinctive civic culture of the American city in which municipal good-government reform took its most fiercely insular, oligarchic form. From the 1930s into the 1970s, the city's tightly concentrated leadership circle—the Dallas Citizens Council—was made up only of business leaders, excluding even academics, attorneys, physicians, and other elite professionals.[52] Together with the exclusiveness and the insularity went a shared preoccupation with exercising police powers and promoting social controls.[53] Clements, who had traveled the world building his offshore rigs, was

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[50] While portrayals of the long domination of Dallas civic culture by business oligarchs—and the aftermath of their rule—are commonplace, useful recent treatments are provided by celebrated local chroniclers Darwin Payne (*Big D: Triumphs and Troubles of an American Supercity in the 20th Century,* 2nd ed. [Dallas: Three Forks Press, 2000]) and Jim Schutze (*The Accommodation: The Politics of Race in an American City* [Secaucus: Citadel Press, 1986]), academic participant-observers Ruth P. Morgan (*Governance by Decree: The Impact of the Voting Rights Act in Dallas* [Lawrence: University Press of Kansas, 2004]), Royce Hanson (*Civic Culture and Urban Change: Governing Dallas* [Detroit: Wayne State Univ. Press, 2003]) and Robert B. Fairbanks (*For the City as a Whole : Planning, Politics, and the Public Interest in Dallas, Texas, 1900-1965* [Columbus: Ohio State Univ. Press, 1998]); and careful historical treatments by Patricia Evridge Hill (*Dallas: The Making of a Modern City* [Austin: Univ. of Texas Press, 1996]) and Michael Phillips (*White Metropolis: Race, Ethnicity, and Religion in Dallas, 1841-2001* [Austin: University of Texas Press, 2006]). The classic expression of the traditional, self-regarding view of Thornton and the other initial leaders of the Dallas Citizens Council is "The Dydamic Men of Dallas," *Fortune*, Feb. 1949, pp. 98-103, 162-166.

[51] Barta portrays his decision to run for governor as an illustration of his way of decision-making. See *Bill Clements: Texian*, pp. 3-12.

[52] See Evridge, *Dallas*, chapter 5; and Amy Bridges, *Morning Glories: Municipal Reform in the Southwest* (Princeton: Ptinceton Univ. Press, 1997).

[53] In addition to the works cited above on Dallas politics, see Chandler Davidson, *Race and Class in Texas Politics* (Princeton: Princeton Univ. Press, 1990), especially chapter 4, on patterns of elite cultural reproduction and shared systems of belief.

almost surely less narrow-minded and morbidly suspicious than many of his peers, but for him, even the elective leadership of Texas was nothing if not top-down.

Clements' relationship with his immediate predecessor at first suggested a degree of continuity extending particularly into the criminal-justice policy realm. Dolph Briscoe, the outgoing governor, who had presided over the preceding six years as a kind of Tory Democratic Calvin Coolidge, all but formally endorsed the conservative Republican after being defeated in his own party primary, and the turnover of power in Austin in January 1979 had some aspects of a legitimate succession.[54] Perhaps the most important degree of continuity was provided by David A. Dean, Briscoe's general counsel, who actually stayed on in the position under Clements (until being appointed Texas secretary of state in 1981). While Dean took on the executive directorship of the Criminal Justice Division staff, the holder of the position under Briscoe, Robert Flowers, stayed on as assistant director, along with other longtime staffers (some of whom, like judiciary program director Willis Whatley, had served under Preston Smith).

The substance of Clements' anticrime legislative agenda also reflected continuity in some ways. Initially Clements, like other governors, entered office with a legislative session already under way and without a well-prepared agenda of his own.[55] The particular contents of the anticrime bills Clements endorsed, and later reworked and proposed in his own right during the 1981 legislative session, were also largely passed down from the previous administration. Clements' own highest priority in the crime package, a bill authorizing the state police force (the Department of Public Safety) to

[54] See Barta, *Bill Clements: Texian*, pp. 203, 214.
[55] Barta, *Bill Clements: Texian*, pp. 222-230.

conduct wiretapping, carried on a longtime stated priority of Briscoe which had been debated in 1977. Other bills in his package (such as the admissibility of oral confessions as evidence in criminal trials, and new bail bond reforms) had similar pedigrees.[56]

Nevertheless, from its beginnings, Clements' law-and-order initiatives reflected his own views and served his own purposes, not those of his predecessors. His own first recorded personal initiative on crime policy, shortly after taking office, was to instruct his aides to arrange for unused Criminal Justice Division discretionary money to fund "a tough drug program."[57] This was the birth of the Texans' War on Drugs (TWOD), a state-funded campaign which increased the severity of state drug laws but also represented a landmark in the mobilization of public antidrug sentiment. The campaign was identified publicly with Ross Perot, who directed the effort at Clements' request, but the origins of the effort lay in the governor's own handwriting.

Days later, on March 7, 1979, the Criminal Justice Division staff submitted to the Governor a detailed set of war plans. Two different forces would be mobilized for the coming struggle:

> ONE: A Special Drug Strike Force, made up of Texas Rangers, will be established. . . . It will be commanded by the current Senior Captain, Texas Ranger Service, and will direct operations of the DPS Narcotics and Intelligence Services. Its operations will be (a) managed by objectives; (b) constantly redeploying personnel based upon daily analysis of drug trafficking intelligence; and (c) coordinating a full utilization of existing local, state, and federal law enforcement and other personnel.

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[56] Compare "Synopsis of Law and Order Legislation Passed by 67th Legislature," Box 32, Folder 17, General Counsel Papers 1979-1983, Clements Papers, with press coverage of Briscoe legislation. See Warren Burnett, "Crime bills: Nothing new in an old war," *Texas Observer*, 6/17/77, pp. 31-33.

[57] See Clements' handwritten comments on memo, Bob Flowers to Gov. Clements, 1/31/79 (forwarded by Gov. Clements to David Dean), Box 5, Folder 39, General Counsel Papers 1979-1983, Clements Papers.

> TWO: The Texans War Against Drugs Committee will counsel and advise the Director of the Strike Force, and recommend and work for legislation necessary to eliminate drug traffic. The committee, with a staff of three, will organize a citizen awareness campaign of the drug traffic issues, utilizing a series of local and statewide television, radio, and newspaper advertisements developing and featuring modern heroes. Advertisements will feature an inward WATS line for citizen informants. . . . Committee staff will pass intelligence from that line to the Strike Force.[58]

Most of the implementation procedures involved the establishment and operations of the "Strike Force," which would target all forms of smuggling and manufacture of illegal drugs (as well as the diversion of legal ones). As for the citizens' committee, the report listed possible several possible projects other than those already cited, such as organizing a speakers' bureau to discuss the dangers of drugs ("Speak to everyone who will listen—civic clubs, churches, television talk shows, influential friends, legislators"), creating similar programs for churches statewide, and organizing Scouts ("both boys and girls, with programs on the dangers of drugs, and to establish a reporting system of drug use, [and] suspicious aircraft").[59]

Undoubtedly one thing making the war on drugs so easy to declare was that no request to the Legislature for military appropriations was required. In accordance with Clements' instruction, CJD staff had identified $534,109 in unused funds controlled by the division, and DPS had some $1.1 million in grant funds budgeted—all of which was declared to be available. The projected Strike Force budget was $644,000, while

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[58] "Strategies in the War Against Drugs in Texas," prepared for Gov. Clements, Criminal Justice Division, 3/7/79, in Box 5, Folder 40, General Counsel Records, 1979-1983, Clements Papers. "Management by objectives," as coined by Peter Drucker and as promised by the Strike Force, was a technique Clements was known to want to bring to state government; Barta asserts that he became impressed with it during his tenure as deputy secretary of defense. See *Bill Clements: Texian*, pp. 234-235.
[59] "Strategies in the War," pp. 12-15.

citizens' committee operations were estimated at $290,967. The strategy sheet even indicated that the Legislature could be asked to appropriate money from a separate CJD planning fund balance if costs ran above what was already available.[60] Clearly the Governor would have his war.

Whatever the extent of its funding and activities, the Strike Force faded from the documentary record, but the waging of the war among the public became a genuinely significant undertaking. The public declaration came on April 16 with the issuing of an executive order creating the Texans' War Against Drugs citizens' committee, and charging it "to assist the Governor and law enforcement agencies in an all-out war against the drug traffic coming into Texas."[61] Somewhat innocuously, at least by comparison with the underlying strategy proposal, the executive order directed the citizens' committee to "study the situation and to make recommendations to the Governor on ways for the state to more effectively deal with the drug traffic," which could include cooperative efforts among agencies and authorities or also "educational projects for citizens, businesses, local governments, and law enforcement agencies." The CJD staff would "serve as the primary staff for the Committee."

Ross Perot had already participated in the strategy planning, although to what extent is not clearly conveyed in the documentary record.[62] A brief history of TWOD's

[60] "Strategies in the War," pp. 16-17.
[61] State of Texas, Office of the Governor, Executive Order WPC-2, Box 5, Folder 40, General Counsel Records, 1979-1983, Clements Papers.
[62] Clements had also appointed Perot to the CJD Advisory Board. The vision of the citizens' committee's work conveyed in the strategy paper (i.e., training Boy and Girl Scouts statewide to watch for suspicious aircraft) is at least highly suggestive of Perot's influence. (Press inquiries during the 1992 presidential campaign revealed some of the extent of Perot's enthusiasm for attacking the drug trade using military and covert assets. He was said to have discussed such ideas as blowing up ships and shooting down planes suspected of smuggling drugs across the border, and he also offered to buy a Caribbean island for the use of

achievements drafted within the organization itself (apparently as part of the group's application for grant aid from the governor's office) describes Perot's actions upon taking over as chairman, after the committee was formally appointed. Under his direction, the group as a whole began by studying "every aspect of the drug culture. They studied the law, penal institutions, medical research, and they talked with nationally known experts in the field."[63] After several months, Perot directed some committee members to draft bill proposals, and assigned others to develop suggestions for law enforcement. A third group, led by "Mr. Perot's right-hand man Tom Marquez," focused on public education. Marquez and his subcommittee "found unbelievable statistics documenting drug use among our children. He found that approximately one out of every three young people age 12 to 17 had tried marijuana and that one in six was a regular or current user." Marquez also found that "the newest scientific research showed marijuana to be extremely harmful to minds and bodies, especially for our young people." Finally, Marquez discovered a strange and terrifying retail phenomenon:

> This subcommittee also learned about "head shops" which were located in almost every community in Texas. A "head shop" is a place where drug paraphernalia is sold and instructions given to juveniles and others on how, when, and where to obtain and use drugs. Tom's goal came into focus when he discovered that the magnitude and scope of the problem was largely unknown to middle and upper income people over thirty. Yet, because of the expense of these illicit drugs, including marijuana, it is the children of precisely these parents who are most acutely affected.

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federal drug agents. See David Jackson, "Perot drug war record reviewed," *Dallas Morning News*, 6/16/92.)

Clements' fairly detailed but cryptic handwritten notes on the strategy paper, dated 3/14/79, included the following: "Citizen Committee staff—to whom report? Only to Chairman Perot—citizen group would have no authority over DPS!"

[63] "History of Texans' War on Drugs," p. 1, Box 5, Folder 40, General Counsel Records, 1979-1983, Clements Papers.

Apparently spurred onward all the more urgently by the upscale demographics of the youth drug culture, the subcommittee "reported these facts to Ross Perot. They felt time was critical and strong action was necessary. They felt that children's lives and futures were at stake."[64]

To save the children of Texas, Perot's subcommittee launched one more initiative which would become a pervasive, enduring theme in the experiences of Texas public school students. The committee applied to the CJD for still more grant funds "to educate the public on the dangers posed by the abuse of drugs, and to create public support and a proper climate for the cessation of illegal drug transactions involving juveniles. The grant was awarded under the name of Drug Abuse Research and Education (DARE) Foundation, Inc., and an all-out campaign against drug abuse in the State of Texas was launched."[65] Using the same selection criteria that would later yield a vice-presidential nominee, Perot assigned the leadership of DARE to Robinson Risner, a retired Air Force general and Vietnam War POW. As the strategy document had anticipated, the citizens' committee's efforts to address the public now proceeded as a kind of paramilitary psychological warfare campaign:

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[64] "History of Texans' War on Drugs," pp. 3-4.

[65] Perot's DARE Foundation, Inc. was actually different from the organization now known as DARE America, which developed and promoted the Drug Abuse Resistance Education curriculum for elementary and secondary school students and police-officer instructors. According to DARE America (http://www.dare.com), its program, founded by the Los Angeles Police Department in 1983, continues to be implemented in 75% of the nation's school districts. Researchers have long disputed the effectiveness of DARE in reducing youth drug abuse. (For several recent examples see U.S. General Accounting Office, *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, GAO-03-172R, January 15, 2003.) The place of Perot's high-profile Texas initiative in the context of antidrug policies nationwide requires a dedicated study, but it seems likely that his work was known to officials in California, as well as in the Reagan Administration and other states, who were planning antidrug educational programs.

> Under Risner's leadership, DARE set out to raise the awareness level of every citizen in the state of Texas, beginning at the community level. The state was divided into six regions, with a DARE office in each region—a small staff of four ran the central office with a youth coordinator and minority coordinator added later to work the entire state. Presentations were made describing the drug problem, the social pressures that encourage such behavior, and the social, psychological, and physiological consequences of drug abuse.[66]

Perot himself targeted particular groups and organizations to be enlisted in the effort. "At his own expense," he staged seminars for the Junior League and the Texas Medical Association Auxiliary. The statewide Parent-Teacher Association passed a supportive resolution, and PTA board members "were trained in another two day seminar, along with the wives of the State legislators, and again at Mr. Perot's expense." Local "community action groups" were then formed across the state, each with "a DARE coordinator, a Junior League member, a TMAA person, and a PTA representative."[67] Over the following months, other fraternal societies and community organizations joined the effort, and by 1982, the leaders of Texans' War on Drugs proudly observed that leaders in other states were using their campaign as a model.

Coinciding with the broader public education campaign, TWOD's bill-drafting efforts led directly to major changes in the state's drug laws. In this respect, as with DARE, the self-promoting narrative crafted by TWOD exercised legitimate bragging rights. Upon its appointment, "the legislative subcommittee, headed by Abner McCall of the Baylor Law School, went into action by teaming up with Rick Salwen, Ross Perot's dynamic corporate lawyer."[68] The proposals that McCall and Salwen drafted were

[66] "History of Texans' War on Drugs," p. 5.
[67] "History of Texans' War on Drugs," p. 5.
[68] "History of Texans' War on Drugs," p. 2.

intended to facilitate law enforcement initiatives (such as the DPS Strike Force) and rested on the same premises about interdiction strategy.[69] One bill defined "trafficking" as a new category of criminal violations and raised penalties (including higher minimum sentences) for possession, as well as delivery, of "commercial quantities" of illegal drugs. It also broadened the existing controlled substances laws to allow for conspiracy charges and seizure and forfeiture of contraband.[70] Other bills raised penalties for selling illegal drugs to minors, provided for revocation of licenses for professionals convicted of felony drug violations, and imposed new record-keeping rules for legal drug prescriptions. One more bill took aim at the head shops, prohibiting "the possession, sale, or manufacture of items used or intended to be used to violate the drug laws," and specifically citing cocaine spoons, heroin packaging balloons, and "power hitters and bongs."[71] With heavy lobbying by TWOD and its allied organizations and "community action groups," the package of five antidrug bills passed through the Legislature in the 1981 general session.

While the successes of the Texans' War on Drugs depended on heavy investments of unpaid toil and sweat by Perot, his lieutenants, and the volunteer groups they targeted, the program grant money awarded by the Criminal Justice Division remained essential to the effort.[72] Just as the quick identification of available funding sources in the planning

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[69] As the TWOD official history shows, the organization's research efforts had determined that Texas was "a major transshipment point" in the cross-border drug trade, with "approximately fifty aircraft flights" daily from Mexico into Texas accounting for much of the smuggling. "It was also thought that increased federal anti-smuggling activities off the coast of Florida would increase the illicit drug trade through Texas. According to the intelligence data, it was believed that Mexico would increase its production of illegal drugs as a result of increased efforts in Columbia [*sic*]." See "History of Texans' War on Drugs," p. 2.

[70] See bill analysis, H.B. 730, Box 47, Folder 3, Clements Campaign Records.

[71] See bill analysis, H.B. 733 (Drug Paraphernalia), Box 47, Folder 3, Clements Campaign Records.

[72] As Clements may have hoped, Perot also appears to have taken on a major share of the expenses of the effort. Risner later claimed that he "put out nearly $2 million out of his own pocket to make sure we were never slowed down." See Marty Primeau, "Ross Perot," *Dallas Morning News*, 7/6/86.

of the War on Drugs reflected the campaign's place among the governor's priorities, so did the amount of continuing funding, in comparison to other program grants and the total amount of criminal justice grants being made. By 1979, the total figure was already down sharply from its mid-1970s peak, as overall budget constraints and disillusionment with LEAA took their toll on congressional appropriations for criminal justice grants.[73] At the same time, CJD's flexibility in allocating grant funds was restricted by formulas for dividing money among geographic regions, and by an accumulation of congressionally mandated earmarks for juvenile justice, corrections agencies, courts, and various other programs contained in CJD's annual plans. Nevertheless, under Clements, CJD made sure that the War on Drugs would be amply funded—at least at its outset. In fiscal 1980, the total budget for CJD grants (reflecting both federal funds and state matching funds) amounted to $23.082 million, with funds appropriated for 1980 estimated at $19.25 million (and the remainder of the budget covered by unspent funds from the two previous fiscal years). Out of this pared-down budget, drawing upon federal funds earmarked for juvenile justice programs, TWOD was able to obtain $584,223 to set up and operate the DARE Foundation, with its six regional offices and community organizing staff, during the year starting in July 1980. This new commitment was easily CJD's largest grant to a private nonprofit agency, exceeding the sums which

[73] According to one staff worksheet, the total annual figure for CJD grants (from both federal and state funding sources) peaked in fiscal 1974 at roughly $35.85 million, but remained at nearly the same level until fiscal 1977, when the total dropped to $22.2 million. See "CJD Funding History: Crime Control Act Funds (Part C & E)," Box 36, Folder 7, General Counsel Records, 1979-1983, Clements Papers.

other politically influential constituent groups had managed to secure on a continuing basis.[74]

Aggressive as he was in putting the grant money he controlled to his own preferred uses, Clements was forced at the same time to deal with unexpected complications that threatened the continued flow of funds. In March 1980, only three months after the passage of complicated legislation reauthorizing LEAA, the Carter Administration revised its budget recommendations and proposed new cuts, which included LEAA's entire budget for new programs. Clements, who wrote an irate public letter to President Carter demanding to have the funding restored, was among the few nationally prominent public officials to voice serious complaints.[75]

More importantly, Clements planned a response to the phasing-out of LEAA which would maintain most of the funds for criminal-justice grants and, not incidentally, cement an alliance with the local officials who had been receiving most of the grant money. With all previously approved LEAA money due to run out at the end of fiscal 1981, Clements nevertheless approved the continuation of most existing CJD operations and program grants through the fiscal year. David Dean, who as general counsel acted as Clements' key adviser on criminal justice, also developed a contingency plan to replace

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[74] Other leading nonprofit groups receiving CJD funding were the Texas District and County Attorneys Association, which was granted $408,000 for the fiscal year beginning in April 1980; the Texas Police Association, which was granted $133,218 for statewide police training during the year starting in November 1979; the Texas Justice of Peace and Constables Association, which received $200,000 for the year starting in November 1979; and the Texas Center for the Judiciary, which received $364,768 between January and September 1980. Smaller sums were granted to groups such as the Amarillo Rape Crisis Prevention Project ($12,478 in calendar 1980) and the Texas Federation of Women's Clubs ($6,789 for the year beginning in October 1980). See "CJD Grants to Private Non-Profit Agencies for the Years 1977-1981," Box 36, Folder 7, General Counsel Records, 1979-1983, Clements Papers.

[75] Letter, Gov. Clements to President Carter, 3/12/80, Box 5, Folder 29, General Counsel Records, 1979-1983, Clements Papers.

most of the federal funds with money from state sources. In recommending these steps to the governor, Dean cited their political importance: "The impact of the plan is to hold together and in place the nonpartisan coalition of law enforcement and criminal justice officials throughout Texas that you have created with your vocal and extended efforts in trying to salvage the LEAA program in Congress and overcoming Carter's determined demise [*sic*] of the program." The plan would also maintain funding for high-priority CJD-funded projects—such as the War on Drugs—and would allow for the possibility of a restoration of LEAA funding under a Reagan administration (which Clements was urging upon the Republican nominee). And it would also allow for the Legislature to consider Dean's contingency plan during the 1981 general session. Dean himself would seek commitments from constituent groups to endorse the Governor's efforts to save CJD funding and to require the candidates they supported to do likewise: "This plan, in effect, tells the nonpartisan coalition of law enforcement and criminal justice officials throughout Texas that you created that they are being given a year's breathing room with the understanding that their active support is necessary for Texas legislative approval of the contingency plan or they are just flat out of luck in the future." [76]

Following Dean's recommendation, Clements proceeded to seek the full political benefits of the "contingency plan" for CJD funding. The successive acts of Congress authorizing federal grant aid required 10% state matching funds in most cases, and under a plan passed in 1972, Texas provided the necessary funds not by legislative appropriations but through dedicated fees assessed against defendants in local, county,

[76] Memo, Dean to Gov. Clements, 7/29/80, Box 36, Folder 6, General Counsel Records, 1979-1983, Clements Papers.

and district courts. The "contingency plan" was to replace at least part of the federal contribution to the pool of funds available to CJD (by then referred to as the Criminal Justice Planning Fund) by doubling the court fees. In the choice of funding mechanism and in other respects, Dean carefully sought to maintain the control over grant funds that had been vested all along in the governor's office—with the understanding that, without the whole structure of federal earmarks and without the need for LEAA approval of state criminal justice plans, the discretionary power of the governor and his CJD would actually be even greater.[77] With the approval of the law enforcement groups whose support he had been cultivating, Clements added the CJD funding plan to the package of criminal justice legislation already being prepared for the 1981 legislative session. In promoting the bill, the governor's staff drew upon the history of criminal justice grants going back to the Preston Smith years.[78] During the session, the list of witnesses supporting the bill in committee hearings included leading district attorneys, police chiefs, the chief justice of the Texas supreme court, and the heads and representatives of most of the state agencies and organized groups involved in Texas criminal justice.[79]

For all of the careful preparations overseen by Dean and Clements, and despite the passage of almost all of their packaged proposals as submitted, the 1981 session was a mixed success for the Governor. Among the Democratic leaders who still commanded broad majorities (despite major Republican gains in 1980), the governor's very success in

[77] For the substance of the bill as proposed by the Governor's office, see bill analysis, "Statutory Authority to Continue Activities of the Criminal Justice Division and Administration of the Criminal Justice Fund," 10/30/80, Box 47, Folder 13, Clements Campaign Records.
[78] See "Ten Years of Accomplishment: The LEAA Program in Texas," Box 36, Folder 7, General Counsel Records, 1979-1983, Clements Papers.
[79] See the typed sheet "CJD Bill Witnesses," Box 36, Folder 6, General Counsel Records, 1979-1983, Clements Papers.

putting grant funds to political use provoked a backlash. When the CJD funding bill was brought before the Texas Senate, early in the session, an amendment was passed giving each of three elected officials—the lieutenant governor and House speaker, as well as the governor—the authority to appoint one-third of the members of the Advisory Board that considered and recommended grant applications. Even final approval of grants, which under federal statute had always been the sole responsibility of the governor, was now to be shared with the other two officials, as part of a three-member "Executive Funding Committee." These were shrewd strokes that exposed a dilemma that Dean and Clements were unable to solve: despite their support for the continuation of the grant program, law enforcement officers and criminal justice officials had no particular stake in Clements' continued personal control over the program as well. Clements was believed to have reluctantly accepted the outcome once passage of the amendment was seen as inevitable, but the issue was reopened when the House passed a version of the bill without the three-way appointments provision. However, with Senate Democrats accusing Clements on "welshing" on the deal previously struck, Clements was unable to take advantage of his House victory and ultimately had to settle for final legislation containing the Senate's terms. The outcome forced Clements to share board appointments and final approval power with Speaker Billy Clayton, a conservative Democrat and occasional ally of the Governor, and Lieutenant Governor Bill Hobby, a moderate with very different views and priorities.

An even more serious threat to the Governor's priorities came from legislators' interest in passing their own appropriations from the Criminal Justice Planning Fund.

This interest was not a new development. But as long as the governor's office exercised authority over federally granted funds expressly delegated by Congress, office staff could argue that raids by the Legislature upon the planning fund, or any interference with the governor's control over program grants, violated federal statutes and would cause the state to lose all of the grant money.[80] What was exposed to legislative appropriators was the accumulated unexpended balance in the planning fund, which reflected receipts to the state from court fees that exceeded the amounts needed to match federal funds (as well as some unspent grant money). This was the money Clements had drawn upon in order to launch the War on Drugs. The final appropriations bill approved by the Legislature in 1979 took just over $8 million over the ensuing biennium (meaning $4 million per fiscal year) out of the planning fund in order to finance six line items, several of which provided additional funds to entities (such as the Prosecutors' Coordinating Council and Sam Houston State University) which were already receiving CJD grants. Most of the money went toward supplements for district attorney salaries to be provided by the comptroller's office.[81] Following the recommendations of his staff, and citing the

[80] During the 1979 general session of the Legislature, one bill proposed to give the Legislature final authority over CJD program grants. CJD staff in the governor's office made the argument that interference with the governor's authority would lead to a cutoff of LEAA funds. See "Bill Analysis: Legislative Control of Federal Funds Act," and attached Legal Opinion No. 77-5 (Pennsylvania State Legislation, August 13, 1976), in Box 5, Folder 13, General Counsel Records, 1979-1983, Clements Papers.

[81] For an explanation of the line items in the appropriations bill, as well as veto recommendations, see memo, Willis Whatley to Jim Kaster, 5/31/79, Box 5, Folder 13, General Counsel Records, 1979-1983, Clements Papers.

Comptroller Bob Bullock opposed the governor's control over state assistance to prosecutors. In addition to having sought the funds contained in the 1979 appropriations bill, he also was seen as an ally of Attorney General White's efforts to provide assistance to prosecutors via the attorney general's office. See memo, Dean to Gov. Clements, 5/13/80 (alleging "a definite relationship between the Attorney General and the Comptroller to prevent the Prosecuting Attorneys Coordinating Council from providing prosecutorial assistance and to provide the Attorney General with ammunition to support his prosecutors assistance project"), Box 19, Folder 15, General Counsel Records, 1979-1983, Clements Papers. Needless to say, Bullock was also a notorious empire-builder in his own right.

Clements vetoed most of the line items (and allowed another large line item for the comptroller's program to lapse, in the absence of necessary supporting legislation).[82]

But, as with the composition of the CJD Advisory Board, the removal of the mandates accompanying federal funds took away constraints on the Legislature. In drafting the CJD funding bill, Dean carefully maintained continuity in the prescribed procedures for planning and consideration of grants (although, of course, the state no longer had to submit its work for LEAA's approval).[83] But given the need to get legislative approval of new financing for the Criminal Justice Planning Fund using state sources, there was no practical way of creating a new mechanism to replace the federal constraints on the Legislature's access to the money. Inevitably, the entire planning fund would now be potentially subject to legislative appropriations.

With the united support of statewide law enforcement and criminal justice agencies (and with the amendment on Advisory Board appointments power), the CJD funding bill passed through the 67th Legislature. But the success appears to have come with further costs to the Governor's own priorities. The final appropriations bill contained a set of line items financed from the Criminal Justice Planning Fund that bore a striking resemblance to what had been passed and vetoed two years before: almost $8 million total over two years, more than half of it going to the comptroller for assistance to prosecutors, and additional sums to the same entities as before (except for a new line item

[82] Whatley recommended that the Governor veto those line items for which the Criminal Justice Planning Fund was the sole source of financing. In two cases (an appropriation to the state Office of Court Administration, and one for the Commission on Jail Standards) Whatley argued that since "the appropriation is reflected in the method of financing," a veto would not be applicable. See memo by Whatley, *supra* note 81. For the actual vetoes, see Proclamation by the Governor of the State of Texas (veto message), 6/14/79, available on the Legislative Reference Library website (http://www.lrl.state.tx.us).
[83] See the procedural provisions as detailed in CJD's bill analysis, *supra* note 77.

of $1.37 million over two years to the Department of Public Safety).[84] This time, however, Clements did not veto the line items, even though the same arguments from two years before would have applied. It appears likely that the same circumstances that reduced his power over the Advisory Committee also applied to the issue of appropriations from the planning fund. Support for the CJD funding bill did not automatically lead to support for the Governor's maintenance of his own powers. Constituents who were able to win further funding commitments from the Legislature were not exactly going to sacrifice their winnings for the greater cause of the Governor's discretionary power.

The direct appropriations from the planning fund, together with the reduction in the flow of funds resulting from the switch to state sources, clearly compromised the Governor's ability to continue using CJD funds for his own priorities. The War on Drugs did not seek a cease-fire, but its planned operations were scaled back. Technically the public educational campaign was funded by federal juvenile-justice grants which were not directly affected by the LEAA shutdown, but these grants were themselves subject to new budget cuts being proposed by the Reagan administration. The leadership of Texans' War on Drugs nevertheless submitted an application for $741,703 for the second year of DARE operations, an increase of 22% over the first year. DARE intended to support a total of "150-175 community coalitions of parents, teachers, school administrators, law enforcement officials, ministers, and other concerned citizens" and

[84] See memo, Bob Flowers to David Herndon, 10/14/82 (suggesting ways of opposing future direct appropriations from the planning fund), and Attachment A, "Funds Appropriated to State Agencies from the Criminal Justice Planning Fund by the 67th Legislature—Biennium 9/1/81 – 8/31/83," in Box 5, Folder 13, General Counsel Records, 1979-1983, Clements Papers.

also planned an array of PTA workshops, law-enforcement seminars, and other public events.[85] CJD staff had to meet with Risner to explain the need to cut back the request by at least $125,600. They explained that available CJD funds were already far below grant requests: "We received $9,090,801 in requests for state agencies with only $5,668,000 in available funds for state agency projects. It has been necessary to cut many state agency projects by 25-50% in order to achieve a budget which is balanced evenly between police, courts, adult corrections, and juvenile corrections." Noting the likely cuts in federal funds for juvenile justice, CJD staffers observed that the need to fund DARE exclusively from state sources would require cuts in existing operations. Given these circumstances, the staffers drew a remarkably modest conclusion: "It would be inadvisable to increase the staff of [the] DARE project, at least until future funding is more secure."[86] Given its place among the Governor's priorities, DARE was actually shielded from the full impact of the fund shortage, but it could not be made immune.

Bob Flowers, who handled the DARE grant application, blamed the funding problem squarely on the Legislature. In a 1982 memo to David Herndon, Dean's successor as Clements' general counsel, Flowers observed that the practice of appropriating directly from the planning fund "seriously hampers CJD's ability to operate the Criminal Justice Assistance Program by reducing the amount of funds available for continuation of existing projects as well as development of new, innovative ones." For fiscal 1983, all new state agency projects had been eliminated from consideration, and

[85] See grant application at Box 5, Folder 3, General Counsel Records, 1979-1983, Clements Papers.
[86] Memo, Bob Flowers to David Dean, 9/15/81, Box 5, Folder 26, General Counsel Records, 1979-1983, Clements Papers.

continuing projects were approved on a short-term basis.[87] As Clements left office after the 1982 election, the instruments he had used to pursue his own priorities appeared to have been effectively constrained.

The legacy of his first term was actually more complicated, and more substantial, than frustrated staffers would have been in a position to recognize. The restrictions on Clements' authority over criminal justice funds were actually removed by the Legislature during Mark White's term (given the absence of partisan motives dividing White from his fellow Democrats in the legislative leadership) and were not again restored. Subsequent initiatives, such as a criminal justice task force launched by the Dallas mayor's office (and later elevated to the statewide level during Clements' second term, in 1987), would continue to draw upon the pool of discretionary funds that Clements had managed to preserve. As the cause of professionalization of criminal justice receded farther into the idealistic past, the legacy of discretionary funds would continue to promote innovative political initiatives and the reshaping of criminal justice politics.

[87] Memo, Bob Flowers to David Herndon, 10/14/82, Box 5, Folder 13, General Counsel Records, 1979-1983, Clements Papers.

Chapter 3

Narrowing the Net: Professional Expertise and the Politics of Sentencing and Corrections in Texas

In recent decades, as shares of responsibility for criminal sentencing practices in Texas became dispersed across a daunting array of stakeholders, the problem of reform grew both more difficult and more urgent. Any comprehensive reform of the sentencing code required technical expertise both intensive and extensive, and a broad perspective above and beyond that of individual judges, courtroom advocates, politicians, or laymen. In large part for this reason, the task had remained unconfronted for decades, while dense thickets of legislated amendments overgrew the original framework of the penal code first passed in 1856. "In every area that we have studied," reported Page Keeton, dean of the University of Texas School of Law, "we have found conflicting lines of decisions, irrational overlaps and inconsistencies, and other signs reflecting over one hundred and ten years of neglect of the Penal Code as a system."[1]

The years that followed may have made up for past neglect, but the outcome of legislative reform efforts was not so much the forging of a rational system as it was a balancing of political forces under extraordinary circumstances. For Dean Keeton, who directed a penal code revision committee of the State Bar of Texas in the later 1960s and early '70s, the revision effort reflected the responsibility of legal-professional elites for

[1] Address text dated 11/17/67 in Box K28, folder "Texas Criminal Procedure Lecture and Tutorial Institute speech, speech drafts, and notes, 1967," W. Page Keeton Papers, Tarlton Law Library, The University of Texas at Austin.

promoting reform as modernization. Achieving this to any extent was a difficult project in itself. But by the 1980s and early '90s, the cause of sentencing reform was essentially one part of a broader conflict over the balance of discretionary power in Texas criminal justice, with crucial consequences not only for the shape of sentencing and corrections policies but for the partisan political evolution of the state.

This struggle was propelled not only by partisan politics but also by other cross currents, such as federal court intervention, ideological conflict among criminal justice professionals, and an emerging source of expert knowledge and policy analysis. The struggle involved not only responses to sharply rising rates of violent crime but also the overcrowding of state prisons, the litigation of the overcrowding issue in federal court, and the state's inability, for more than a decade, to accommodate the inflow of convicted felons while complying with federal court mandates. Forced to try to manage and resolve a chronic problem in its critical stages, and forced to acknowledge the unanticipated consequences of past actions, political leaders relied increasingly on policy analysis and evaluation by staffers with academic expertise. By the early '90s, the apparent necessity of change in sentencing practices offered a new opportunity for reform proposals informed by research and formulated by professional staff. Some participants who advocated alternatives to imprisonment saw sentencing reform as an opportunity to constrain the tendencies of local prosecutors, judges, and juries toward excessively punitive decisions. But in passing legislation, the politics of practitioner interest-groups and partisan constituency-building continued to determine final outcomes.

In recent decades, in a nation pervaded by both litigation and fear of crime, most states and cities were forced at some point to deal with overcrowded prisons and jails, court oversight, and the consequent need for changes in sentencing. Some other states developed mechanisms for insulating state penal policies from political pressures, or linking them to the availability of prison space to meet projected demands for confinement.[2] Almost all of these efforts involved the development of new, comprehensive guidelines for criminal sentences which narrowed the available range of penalties and, to some degree, replaced the discretion of sentencing authorities (mainly judges) with the prescriptions of experts and legislators. But in Texas, where guidelines were resoundingly rejected, unrealistically severe penalty lengths (which inevitably overstated time to be served) maintained, and the traditional prerogative of jury sentencing preserved, the limited influence of reform-minded experts (confronted by established practitioners) was reconfirmed. Insofar as the approved legislation was informed, and constrained—and thereby legitimized—by formal policy research which was generally accepted, the process offered some support for a vision of state-supported expertise as a nonpartisan, agenda-free, "user-friendly" resource, enabling a broad range of possible legislative outcomes by offering decision-makers the best available knowledge of the consequences of alternative actions. This narrowed vision of the expert role effectively abandoned the hope of influencing debate by shaping its terms and

[2] See Michael Tonry, *Sentencing Matters* (New York: Oxford Univ. Press, 1996), chapter 2, and also Richard S. Frase, "Sentencing Guidelines in the States: Lessons for State and Federal Reformers," *Federal Sentencing Reporter*, Vol. 6, No. 3 (Nov./Dec. 1993), pp. 123-128, as well as subsequent articles in the same issue on individual states. Michele Deitch describes the failure to institute such mechanisms in Texas in her article in the same issue, "Giving Guidelines the Boot: The Texas Experience with Sentencing Reform," pp. 138-143.

parameters, and conceded failure to counter the prevailing trends toward mass imprisonment, abandonment of alternative sanctions, and the disproportionate impact of criminal justice on racial minorities. Yet ultimately even this view overestimated the willingness of partisan political leaders to tolerate a source of potential opposition supported by state agency funds.

In developing the penal code revision proposal that went before the Texas Legislature in 1971, Dean Keeton and the State Bar of Texas provided an unusually pure example of the earnestly civic-minded sponsorship of progressive reform by an organized profession and its leading academic lights. In responding to the proposal, the Legislature offered a fairly typical demonstration of the enduring tendencies and rooted principles of state politics.

In the context of the prevailing currents in criminal sentencing policies nationally, the initiative by the Texas bar was a careful and deliberately conventional expression of longstanding reform principles, as expressed in then-current American Bar Association standards and the American Law Institute's original 1962 Model Penal Code. Beginning in 1966, the bar committee on revision of the penal code, chaired by Keeton, embarked on an exhaustive effort to mediate between accepted modern models and existing Texas statutes and case law. The work took much longer than expected, Keeton later explained, in part because of the committee's consideration of core principles of criminal law, but largely because of the sheer extent of the duplications, inconsistencies, outright contradictions, and other mystifying contents of the existing code. Keeton used

archaisms still on the books to press the case for reform. "Our gambling statutes bristle with long-forgotten game words such as 'muggins,' 'A.B.C.,' 'crack-or-loo,' and 'bucketshop,'" he observed in one speech, "and the squabbles and disputes of a frontier society come to life in the Penal Code's provisions on animals."[3]

As important as it was to clean up the old code, casting the committee's proposed changes in terms of modernization and rationalization seems to have been calculated to influence the public perception of the revisions generally—including those which actually overrode traditional principles rather than reconciling them, or involved ideological differences rather than objective corrections. The reclassification of offenses and punishments (much of which survived the legislative gauntlet) provides one example. Citing an unmanageable array of overlapping, or arcanely specified, offenses and a "bewildering variety and combination" of punishments, the committee wrote a consolidated list of offenses and graded them according to four felony categories (three degrees, plus capital felony) and three classes of misdemeanors. Minimum and maximum penalties were then assigned to each of these classifications.[4] Keeton acknowledged before one audience that this new code "effects a general reduction in penalties" (although not to the extent recommended in the ABA standards, as he took care to point out).[5] He chose not to make the same point in publicizing the code revisions

[3] "The Proposed Texas Penal Code," speech by the Hon. Page Keeton to Governor's Conference on Implementation of the American Bar Association Minimum Standards for Criminal Justice, Austin, June 12, 1970, p. 10, in Box K27, folder "Governor's Conference, 1969-1970," Keeton Papers.
[4] See Texas Penal Code Revision Project, *Revised Report on Sentencing,* Draft 3 (January 5, 1970), sections 6.03 through 6.07 (pp. 5-10), and Page Keeton and Seth S. Searcy, "A New Penal Code for Texas," *Texas Bar Journal*, December 1970, pp. 982-985.
[5] "Sentencing Under the Proposed Texas Penal Code," a statement by Dean Page Keeton to Sentencing Institute, Huntsville, Texas, May 1, 1970, pp. 7-8, in Box K27, folder "Sentencing Institute, 1970," Keeton Papers.

to a broader audience, as in his *Texas Bar Journal* article. He did emphasize, in the article as elsewhere, that the revised code required the completion of the minimum sentence assessed before allowing for parole eligibility, "so that the initial sentencing authority can ensure a minimum period of incapacitation for serious offenders."[6] He also cited the inclusion of extended sentencing provisions for third-time felons.[7]

Arguably even more important than the rewriting of the code, however—although receiving less emphasis, for seemingly understandable reasons—was the proposal to end the practice of jury sentencing in noncapital cases. This was a progressive reform that was contained in the Model Penal Code but had long since been generally adopted outside the South. Along with only five other states, Texas had retained the ancient tradition of jury sentencing for all felony charges (although a 1966 amendment to the existing code allowed the convicted defendant facing sentencing to choose between the jury and the judge).[8] Early in the redrafting process, however, committee members agreed on the need for change, and in this case (as in others, at least to some extent) the theme of modernization seems to have invoked in all honesty. "It is true that Texas judges have, in the past, shown reluctance to discard entirely the insulation of jury sentencing," commented the author of the first preliminary draft of the new code.

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[6] "A New Penal Code for Texas," p. 990.
[7] See "A New Penal Code for Texas," p. 990; "Sentencing Under the Proposed Texas Penal Code," p. 8.
[8] The other five states, all at least arguably Southern, are Virginia, Kentucky, Arkansas, Missouri, and Oklahoma. The leading authority on the history and contemporary patterns of jury sentencing, Nancy J. King, provides a useful discussion of contemporary practices—albeit not in Texas—in "Felony Jury Sentencing in Practice: A Three-State Study" (co-written with Rosevelt L. Noble), *Vanderbilt Law Review* 57 (2004) 885-947. On the 1966 amendment allowing the option of judge or jury, see John F. Onion, Jr., "Some Major Changes in the Revision of the Code of Criminal Procedure," (State Bar of Texas, n.d.).

"However that may be, the time has come for Texas to join the vast majority of jurisdictions that place this most difficult decision in the hands of the judge."[9]

Dean Keeton offered several compelling reasons for the change. Judges could be expected to make better informed decisions, simply because their trial rulings on admissible evidence would often serve the purpose of restricting, rather than deepening, the jury's knowledge of the defendant. Moreover, Keeton argued that judges, over time, would "develop sentencing expertise that no jury, sitting once in their collective lifetimes in a single criminal case, can ever develop."[10] Expert decision-making in sentencing would improve the justice system broadly. Judges could be required to follow detailed procedures in rendering their decisions, and the revised code instructed judges to hold a post-trial sentencing hearing and obtain a pre-sentencing examination and report by a probation officer after each felony conviction.[11] Under current practice, Keeton observed, "the variety of authorized punishments, combined with the availability of jury sentencing, frustrate the Legislature's attempt to create an indeterminate sentencing system."[12] But the code revision and judicial sentencing decisions would together reduce the system's vast disparities and allow the Legislature's intentions to be fulfilled in practice.

The lawyerly argument directed at the Legislature betrays a degree of doubt about the fate of the project. The State Bar had previously developed and sponsored reforms of the Code of Criminal Procedure (including the option of being sentenced by the judge or

[9] "Preliminary Draft: Revision of Texas Penal Code" (Fred Cohen, reporter), May 26, 1967, p. 17.
[10] "Sentencing Under the Proposed Texas Penal Code," p. 9.
[11] For hearing procedures and presentence report requirements see *Revised Report on Sentencing*, Draft 3, pp. 32-39.
[12] "Sentencing Under the Proposed Texas Penal Code," p. 6.

jury), which passed during the 1965 legislative session, but the effort had sparked controversy and bitter resistance by some prosecutors. Keeton's public statements on the committee's work all cited the individual members at length to show that all interested parties were well represented. What he was up against is illustrated by a curious souvenir from a member of the state capitol press corps, who sent Keeton a clipping of a news brief he had written on the ongoing project, together with a supposedly secret "hard line," brass-tacks version of the same story as supposedly rewritten by Keeton's critics. The inside dope was that the committee was visibly anxious to avoid the fate of its predecessor, and that despite the inclusion of Harris County (Houston) district attorney Carol Vance, prosecutors as a group assumed that the committee, like the State Bar itself, was dominated by the defense bar.[13] The inevitable attack was launched late in 1970, when Henry Wade, the Dallas County district attorney, citing outdated draft sections of the committee report (and distorting their contents), accused the committee of seeking to decriminalize drug and sex offenses.[14] Keeton sent an angry reply and organized a campaign of letters supporting the State Bar and its work. Committees in both chambers of the Legislature held hearings during the 1971 session, but in the end neither committee acted on the proposal. The success claimed by the prosecutors was undoubtedly aided by the Legislature's consuming preoccupation with the Sharpstown banking scandal, in which most of the leading figures in state politics were in some way embroiled.

After the session Dean Keeton gave up his leadership role, but the State Bar maintained the penal code revision committee and expanded its membership to include

[13] Anonymous note addressed to Keeton, Box K30, folder "Committee correspondence & reports, 1967-1968," Keeton Papers.
[14] Press release, n.d., Box K26, folder "Penal Code general material 1969-72," Keeton Papers.

Wade and other representatives of the district attorneys' lobby. On the eve of the 1973 legislative session, T. Gilbert Sharpe, Keeton's successor as chairman, unveiled a revised proposal. Both prosecutors and members of the defense lawyers' association had, according to Sharpe, "rendered valuable assistance in reviewing the prior proposal and suggesting certain changes therein."[15] The main change was that the existing option of jury sentencing was maintained, although judges were authorized to set aside convictions for third-degree (the least serious) felonies and substitute judgments for Class A (the most serious) misdemeanors. Struggles over other issues, such as reduced drug offense penalties and the treatment of abortion, were left unresolved over the interim, but the announcement of the *Roe v. Wade* verdict, in the opening days of the session, removed one of the possible roadblocks. With the new proposal maintaining at least qualified support from each of the interested groups, the Legislature finally enacted a new penal code, bringing eight years of work to a close.

Penal code revision, as pursued by Dean Keeton—together with the forerunning struggle to pass the criminal procedural revisions—revealed the waning power of leading professional groups to advance progressive reforms on the strength of the prestige and deference they commanded, at least in the face of the emerging politics of crime and criminal-justice issues. Beginning with its accommodation of the prosecutors' views on penal reform, the State Bar made a practice from then on of avoiding possible confrontations with either of its mutually antagonistic constituent groups. With the views of University of Texas law professors eliciting the suspicious scrutiny of the institution's

[15] T. Gilbert Sharpe, "A Proposed New Penal Code for Texas," *Texas Bar Journal*, December 1972, pp. 111-113.

own regents, Dean Keeton was forced to spend time and effort defending his own prestigious institution.[16]

The eventual reemergence of the sentencing code itself as an object of public concern—and expert attention—resulted in part from the unanticipated consequences of long-running political themes involving criminal justice, and the policies they promoted. As crime rates rose and public fears grew, politicians competed to establish their tough-on-crime bona fides. Even Governor Dolph Briscoe, mostly content to block tax increases and remain secluded on his ranch, felt compelled in 1977 to appear in public to promote a package of "crime bills," which lengthened selected sentences and set minimum requirements of calendar-time-served for inmates convicted on aggravated counts. His successor, Bill Clements, the first Republican governor of Texas since Reconstruction, aggressively sought to use law and order to build new political alliances. As new policies added to rising demand for prison space, Jim Estelle and the TDC leadership began keeping significant numbers of inmates "triple-celled" and struggled to win increased funds for expansion.

The *Ruiz* ruling did not preempt Clements' carefully planned legislative agenda built around law enforcement and drug penalties, but it negated the intended political effects of the legislation. For more than a decade, the tide of the prison overcrowding crisis continued to sweep crosswise over the prevailing currents of law-and-order politics. Statewide leaders of both parties struggled to steer through these waters. Instead of

[16] See the correspondence in Keeton v. Erwin files, Box G138, folders 1-7, Tarlton Law Library, University of Texas at Austin.

reaping the rewards of his hard-won credentials as a hard-line crime fighter, Clements was forced to deal with the mounting consequences: court mandates, prisons closing to new inmates, policy choices without political benefits. Mark White, who succeeded Clements, was much less committed to the extension of punitive sanctions as a means of constituency-building, but he too proved unable to manage the prison capacity crisis without suffering political damage. One potentially significant initiative of the White years was the creation of a permanent state agency staff which could apply the tools of professional analysis to the range of state correctional policies and proposals.

In his second term as governor, from 1987 to 1991, Clements began what would become a drastic expansion of the Texas prison system. At the same time, however, he allowed for two developments which had the potential effect of limiting, to some degree, the growth of imprisonment. One was the increasing role of the staff of criminal justice policy experts, whose work had the effect of promoting legislative alternatives to the governor's own agenda. The other arose from *Alberti v. Sheriff*¸ a case in federal district court in which Harris County, originally the defendant in a jail overcrowding suit, and struggling to meet the terms of longstanding court orders, itself sued to force the state to take in the large backlog of convicts sentenced to prison but still waiting in the jail. I argue that it was the second of these developments, more than the first, which held out the best chance for changing Texas sentencing practices and thereby limiting the extent of the prison boom. Ultimately, episodes of litigation—specifically the original *Ruiz* decision, and the strange-bedfellow politics surrounding the *Alberti* case—came closest to pulling the development of the Texas prison system off the course that it ultimately

took. Outside of the courtroom, professional expertise could not effectively promote the same opportunities for reform.

Bill Clements came to power in Texas as an outsider to state government, and viewed corrections accordingly. Upon taking office in 1979, the same governor who moved aggressively to win the support of local law enforcement displayed none of the same interest in identifying himself with the TDC leadership. Clements clearly mistrusted them, although it is not immediately clear how much this reflected wariness due to the *Ruiz* trial as it continued, or any sense on his part of the true state of the prisons, or simply the longstanding ties that TDC directors had cultivated with state Democratic Party potentates. He made a crucial contribution to prison reform, in the view of Steve Martin and Sheldon Ekland-Olson, by appointing Republican businessman Harry Whittington to the Board of Corrections; with no political or financial ties to the prison system or its managers, Whittington was willing to demand serious, critical oversight of Estelle's operations and maneuverings.[17] On the other hand, Clements made his own small but significant contribution to the overcrowding problem by rejecting a relatively high rate of paroles approved by the parole board, placing his law-and-order agenda above the needs of the prison system. Clements' other expression of his initial views about the prison system came at a greater cost, ultimately, to himself. In June 1979, following a session of the Legislature which passed a budget well beyond his recommendations, he vetoed $30 million in prison construction funds, among other line

[17] See Whittington's introduction to Martin and Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down*, and pp. 227-232. Much later, in 2005, Whittington gained unwanted fame as Vice President Dick Cheney's unlucky hunting partner.

items.[18] With White, as the new attorney general, taking over formal responsibility for the state's defense in the *Ruiz* trial, Clements kept the proceedings at arm's length.

When the *Ruiz* decision was finally handed down, however, it touched off a struggle and a chain of consequences which would ultimately embroil the governor directly in the prison system's troubles. While Judge Justice found deficiencies in all the main aspects of the prisons at issue in the litigation—overcrowding, security staffing levels, medical care, disciplinary procedures, access to courts, fire safety—overcrowding was not only a fundamental issue which contributed to the others, but also the least amenable to being relieved by anything other than a reversal of the state's most basic principles of penal confinement. In his December 12, 1980 memorandum opinion in *Ruiz*, Judge Justice carefully assembled the trial findings about the state of the overcrowding problem.

Having set forth the case against TDC on grounds of overcrowding, as well as medical care and the other main issues, Judge Justice applied the same "totality of circumstances" argument to the Texas prison system, with its giant facilities holding up to 4,000 inmates, that he had used six years before in demanding the closure of the Gatesville and Mountain View training schools in *Morales v. Turman*. The essential

[18] The entire TDC appropriations request for the 1980-81 biennium totaled $351 million, with $131 million involving construction programs and $83 million for new cell space, compared with $30 million in the previous budget cycle. See House Study Group Special Legislative Report No. 43, *Overcrowding in Texas Prisons*, April 18, 1979, pp. 9-11. Paul T. Wrotenbery, an aide to Clements, later claimed that he had met with Estelle to discuss budget cuts and Estelle had volunteered the $30 billion, claiming that "TDC could not expend this money during the biennium" due to changed circumstances since the development of the original request, and that Estelle "had not, because of the budget process, had an opportunity to get this amount eliminated from the appropriations bill." See Memorandum for the Record by Paul T. Wrotenbery, 5/20/82, Box 23, Folder 21, General Counsel Records, 1979-1983, William P. Clements, Jr. Papers, Texas A&M University Libraries. This was the source of the explanation which Clements himself was forced to cite frequently during his 1982 and 1986 campaigns.

argument was that the patterns of abuse were too deeply rooted in the institutions as they existed, and existing managerial controls over huge facilities were too rudimentary to deal with the patterns. It followed that attempts to address the system-wide overcrowding by building more overpopulated institutions must be ruled out. Existing TDC unit prisons, Justice concluded, "must be broken down into much smaller organizational entities than those which currently exist, and each new component must have its own manageable supervisory structure." And any new units to be built would have to be on a reduced scale, as well as located sufficiently close to metropolitan areas to allow for the successful recruitment of professional staff.[19]

In the wake of the ruling, state leaders had to make fateful decisions on where to accommodate the court and where to resist—decisions which Judge Justice intended to force the state to face promptly. Like the detailed memorandum opinion in the *Morales* case, the *Ruiz* opinion did not include provisions for relief, but a brief order supplementing the memorandum opinion ordered the parties to confer and submit a proposed remedial decree within sixty days.[20] In preparing for conferences with the plaintiffs and the Justice Department, TDC and other state officials had to revisit and reconsider their existing agency priorities. Overcrowding, like the deficiencies of medical care (and unlike the delegation of broad authority to inmate guards), was a problem that the agency had itself acknowledged and was trying to address on its own, having appealed for state support it was bound to be explored in the negotiations. But in

[19] *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980), Memorandum Opinion, pp. 394-396.
[20] Martin and Ekland-Olson view the *Ruiz* remedial orders as clearly reflecting the lessons Judge Justice took from his experience with *Morales.* See *Texas Prisons: The Walls Came Tumbling Down*, pp. 177-178.

contrast to their position on medical care, TDC officials felt unable to move very far toward the plaintiffs' demands (as reflected in the judge's ruling). "Triple-celling," at least, was legally indefensible and would have to be ended, but any commitments TDC made to overcrowding relief would have to be "paid for" in terms of new capacity and, inevitably, greater numbers of releases. Paul Wrotenbery, the governor's budget aide, explained to Clements that TDC was hoping to implement several new "back door" policies, such as releasing inmates within six months of their scheduled discharge, and a new work-release program Estelle had proposed which would allow inmates to live at home under close supervision. Another option was to "attempt to have more convicted felons awaiting appeal be detained in the local county jails rather than at TDC." Wrotenbery added: "Politically, this would be very hard to accomplish."[21]

Ultimately on overcrowding, as on most other issues, TDC was unwilling to concede enough to reach an agreement, and the issue was left out of the consent decree issued on March 3, 1981 (which included medical care and several minor matters). The position maintained by the state was that it would agree to end triple-celling in cells with 60 square feet or less by November 15, but beyond that it would make no binding commitments. The goal would be to raise the ratio of dormitory space to inmates from current levels by 1984, but if TDC could not comply by then, it could file "a detailed report of steps they have implemented and what steps are planned and allow the Court to determine whether additional time should be allowed."[22]

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[21] Memo, Paul T. Wrotenbery to Gov. Clements, 2/9/81, Box 37, Folder 22, General Counsel Records, 1979-1983, Clements Papers.
[22] Memo, McCollum to David R. Dean, 3/13/81, in Box 37, Folder 22, General Counsel Records, 1979-1983, Clements Papers..

As expected, this was not nearly good enough for Judge Justice, whose April 20 relief decree closely followed the plaintiffs' proposals and spelled out precisely what the political leaders of Texas were up against.[23] TDC was directed to "employ all measures within their power to reduce the total population of prisoners . . . as well as the prisoner population at each prison unit."[24] These measures were to include the removal of obstacles to grants of good time and parole, expansion of work furlough programs and community-based facilities, and mandatory review of the records of various types of prisoners not granted early release. Judge Justice also set a series of caps for the overall TDC population, with annual reductions in the figure for inmates relative to available space, with no new admissions to be allowed if the cap was exceeded. He set deadlines for ending "quadruple-celling" (immediately), triple-celling (by August 1), and then double-celling in cells with 60 square feet or less (over the following two years). A similar series of caps and deadlines applied to the population of inmates housed in dormitory space.[25] In another section of the order, Justice issued instructions for new facilities: no units to contain more than 500 inmates, no units to be built more than fifty miles from a major metropolitan area (unless TDC could demonstrate that it could recruit and maintain adequate numbers of professionals), and no double-celling. Existing unit prisons would have to be subdivided and retrofitted to comply with the restrictions on

[23] *Ruiz v. Estelle*, Amended Decree Granting Equitable Relief and Declaratory Judgment, May 1, 1981. The version dated May 1 contains typographical corrections of the April 20 version and minor substantive amendments. In a memo forwarded to Gov. Clements, staffer Johnny R. McCollum gave a synopsis of the consent decree, reflecting positions agreed upon by the parties, and provided outlines of separate proposed orders tendered to Judge Justice by the separate parties which contained their positions on the issues still in dispute, such as overcrowding and population reduction, the closing of Huntsville Unit Hospital, staff ratios, use of inmates in building service jobs (such as building tenders), and others. See memo, McCollum to Dean, *supra* note 22.
[24] *Ruiz v. Estelle*, Amended Decree, May 1, 1981, p. 1.
[25] *Ruiz v. Estelle*, Amended Decree, May 1, 1981, pp. 3-8.

new ones. Ultimately all prisoners in Texas would be kept in single cells of at least 60 square feet, or in dormitories with at least 60 square feet per inmate.

State leaders never once considered agreeing to these terms. Clements did send other officials a brief preliminary study, compiled by his own staff, of some of the budget implications if the overcrowding provisions did have to be implemented.[26] But, as with the Huntsville Unit Hospital and all other issues not resolved in the consent decree, state officials shared a single-minded determination to reverse the overcrowding relief orders on appeal. Until the appeal ran its course, virtually everything that was done by state leaders in response to *Ruiz* was aimed directly at the Fifth Circuit Court of Appeals.

The state's legal strategy yielded mixed results. It failed in its goal of preserving the existing regime at TDC and its control over the prisons. This failure had less to do with the overcrowding issues than with the part of the *Ruiz* lawsuit that involved TDC's historically rooted pattern of staffing, with its reliance on inmates to perform guarding and other functions. Judge Justice's ruling had condemned the "building tender" system, and his relief order had sought to abolish it by eliminating the inmate work assignments and formal titles that trusties normally held.[27] Since the "building tender" system was formally outlawed, and since TDC staunchly insisted that it did not exist, its continuation in secret was the Achilles' heel of the state's legal defense. Anticipating the state's resistance to his orders, Judge Justice had appointed an expert in prison litigation, Vincent P. Nathan, to serve as a special master of the court, with the power to investigate

[26] Memo, Johnny McCollum to David A. Dean, 4/22/81 (with Gov. Clements' handwritten instructions on forwarding to Jim Estelle, TDC board members, and other parties), Box 37, Folder 22, General Counsel Records, 1979-1983, Clements Papers.
[27] See *Ruiz v. Estelle*, 503 F.Supp. 1265, at 1294-1298.

the prisons and monitor compliance (or the lack thereof). When one of Nathan's assistant monitors, David Arnold, reported on the uninterrupted authority and control of building tenders over cellblocks (including their possession of weapons), TDC and other state attorneys fiercely attacked the monitor and demanded that Justice dismiss the special master. (Clements contributed his share to this effort, accusing Nathan of "playing father confessor to the inmates" and claiming wrongly that the monitors were the subject of a grand jury investigation.[28]) The trumped-up charges against the master's office were quickly abandoned after Justice began holding hearings on Arnold's findings and took testimony from inmate witnesses, and the state was forced to settle with the plaintiffs and commit explicitly to dismantle the building tender system. With this outcome Estelle lost much of the credibility and deference that he and his predecessors had long commanded. By 1984, TDC was under new leadership which was committed to uprooting and replacing the traditional mechanisms of control and order maintenance.[29]

All of this was both dramatic and genuinely significant, but it overshadowed a judicial defeat for the cause of prison reform which was arguably more important in the long term.[30] This was the victory (albeit a partial one) that the state's defense obtained

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[28] Martin and Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down*, pp. 195-200.

[29] Estelle's final downfall came in 1983 after another monitor's report cited persistent episodes of beatings and other illegal use of force by guard staff. The classic inside account of the legal and political battles that led to the end of the Estelle regime is in *Texas Prisons: The Walls Came Tumbling Down*, chapters 6 and 7. The standard analysis of the building tender system, in the context of Texas prison traditions and the guard subculture nurtured by Beto and Estelle, is in Ben M. Crouch and James W. Marquart, *An Appeal to Justice: Litigated Reform of Texas Prisons* (Austin: University of Texas Press, 1989), chapters 2-5.

[30] Martin and Ekland-Olson's account portrays the appeals court's opinion as a glass half full, from the plaintiff's perspective, emphasizing that its rulings affirmed Judge Justice's findings of unconstitutionality, as well as his remedial orders on access to courts and various others. (The court provided a convenient summary of its rulings at 679 F.2d 1163-1165.) This judgment seems understandable, given that Judge Justice's underlying opinion was at stake and that state officials were fiercely determined to see their original case vindicated, but it reflects the contemporary perspective of engaged observers. My contention, in light of the ultimate direction of penal policy over the two decades that followed, is that the appeals

on the overcrowding issues before the Fifth Circuit Court of Appeals. As state officials realized, in order to avoid making drastic changes to the basic organization of the prison system, as well as its individual units, they needed to get both a stay of Justice's remedial orders and a reversal of his opinion rulings.[31] They were able to get both, at least partially. Within days of Judge Justice's decree, Ed Idar, the assistant attorney general who had been the lead defense counsel during the trial in district court, filed a 108-page motion in the appeals court that sought a stay of almost every one of Judge Justice's remedial orders (as well as the elimination of the mastership).[32] The Fifth Circuit responded by issuing a stay order on June 26, 1981.[33] The court applied a test—likelihood of success on appeal, and plausible claims by either side of "irreparable harm" resulting from the implementation or staying of orders pending appeal—which worked against most of Idar's claims but effectively penalized Justice's most far-reaching and ambitious orders (the undoing of which would have been least feasible in case of a reversal on appeal). The order specifically stayed Justice's schedule for single-celling of inmates, as well as his directions regarding prison reorganization, new site selection and construction requirements, and implementation of work furlough and community corrections programs.[34] (Significantly, however, the stay order did not comment on, or stay, Justice's orders pertaining to dormitory space. This maintained the schedule for the

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court's refusal to permit the restructuring and constraining of the prison system looms larger at a greater distance.

[31] Johnny McCollum used this point—that the state could ultimately win on appeal but still lose the war if it couldn't obtain a stay—to emphasize the need for legislative appropriations and other measures to cope with the prospect of actually having to implement the court order—a task which proved too big for one memo. See memo, McCollum to Dean, 4/22/81, *supra* note 26.

[32] *Ruiz v. Estelle*, Appellants' Motion for Stay, Box 34, folder 2, Eduardo Idar, Jr. Papers, Benson Latin American Collection, the University of Texas at Austin Libraries.

[33] *Ruiz v. Estelle*, 650 F.2d 555, U.S. Court of Appeals, Fifth Circuit, Unit A.

[34] *Ruiz v. Estelle*, 650 F.2d 555 at 567-575.

state to reach 40 square feet per prisoner by November 1981 and 60 square feet by a year later.) The circuit court judges accepted the state's arguments that Justice's schedule for single-celling would effectively preempt the appeal process, and that the restrictions on new prisons stood in the way of achieving any mitigation of overcrowding. These arguments received last-minute reinforcement from the Supreme Court's decision in *Rhodes v. Chapman,* handed down on June 15, which reversed a district court ruling on the unconstitutionality of double-celling at an Ohio state prison.[35] In aggressively seeking to secure rapid, irreversible progress on different issues simultaneously, Judge Justice turned out to have overreached.

The circuit court's ruling on the appeal itself finished the work that the stay had begun, narrowing the scope of relief and limiting the extent of judicially imposed reform. The ruling came on June 23, 1982, by which time the state's war against the special master had played out and the building-tender issues had been settled separately. For Clements, White, and other top officials, the political stakes involved in the outcome remained intense and had led to the retainer of Fulbright & Jaworski, the nationally famous, power-brokering Houston firm, to handle the appeal.[36] Aside from the sheer urge for vindication, the critical task was to secure the reversal of the overcrowding

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[35] *Rhodes, Governor of Ohio, et al. v. Chapman et al.,* 452 U.S. 337 (1981).

[36] The decision to hire Fulbright & Jaworski was formally taken by the Texas Board of Corrections, but appears to have been worked out between the board and Attorney General Mark White, whose office was responsible for representing state agencies and had handled the *Ruiz* defense (under successive attorneys general) from the beginning. Pike Powers, a partner in the firm and a confidant of White, headed the litigation for the firm. The decision reflects the intensely competitive, mutually mistrustful maneuvering among the state officials who were exposed politically to the effects of the litigation. White had good reason to believe that both TDC officials and Governor Clements had intended for him to bear the blame for any ultimate failures in the litigation. See memo, Robert E. DeLong, Jr. (TDC general counsel) to W. J. Estelle (regarding "Requirements for Legal Support in Ruiz Case"), 2/27/81, in Box 23, Folder 31, William J. Clements, Jr., 1978, 1982, and 1986 Gubernatorial Campaigns, Texas A&M University Libraries (henceforth Clements Campaign Records).

orders that had been stayed. This task was largely accomplished—unsurprisingly, given the *Rhodes* ruling and the top legal talent brought to bear.[37] "We are left with the conviction," the appeals court wrote, "that, without the guidance now provided by *Rhodes v. Chapman*, the district court adopted some remedies that are not essential for the elimination of unconstitutional prison conditions." Specifically, on overcrowding remedies, Judge Justice had "failed to consider the cost of the remedial measures ordered as well as the possibility of achieving constitutional conditions without requiring single-celling."[38] The single-celling orders were therefore vacated. On dormitory space, the appeals court sustained the 40-square-foot requirement that had already gone into effect, but it vacated the next step of requiring 60 square feet by November 1982, reasoning that the existing rule was what TDC could accommodate without undue cost. And the other remedial orders—the furlough and early-release mandates, reorganization of prisons, restrictions on new sites—were dismissed, in every sense. "Palaces may be erected in the wilderness," the judges wrote. "Large prisons may be impersonal but they are not necessarily inhumane. . . . The effect of these remedial measures does not appear to us sufficient to warrant their economic cost, their intrusion on state decision-making, or the supervisory burden that their administration would impose on a federal court."[39]

Having prevailed on the most essential counts, Clements, White, and the rest of the state legal team declared victory, with good reason. Nevertheless, even if the hope of

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[37] See brief of the appellants, U.S. Court of Appeals for the Fifth Circuit, Sept. 25, 1981, Box 2004/016-29, Texas Department of Criminal Justice, Office of General Counsel, Ruiz Case Files, Archives and Information Services Division, Texas State Library and Archives Commission. Martin and Ekland-Olson point out that the arguments on overcrowding take up almost half of the brief. See *Texas Prisons: The Walls Came Tumbling Down*, p. 187.
[38] *Ruiz v. Estelle*, 679 F.2d 1115 (CA.5, 1982) (henceforth *Ruiz* 1982) at 1145.
[39] *Ruiz* 1982 at 1148.

forcing Texas to remake its prisons along progressive lines was lost—as the plaintiffs had reason to expect it would be, after *Rhodes*—there was still hope for some further degree of relief. The silver lining of the appeals court ruling, for the plaintiffs and Judge Justice, was that the original district court ruling—that overcrowding, among other conditions cited by the plaintiffs, violated the prisoners' Eighth Amendment rights—was affirmed; it was only the remedies that were overturned. (And not all were overturned, since the existing 40-square-foot limit on dormitory crowding was left in effect. Judge Justice's aggressive scheduling had accomplished at least this much.) Justice was not instructed to issue a new decree, but plaintiffs were expressly allowed to move for a new hearing within one year to determine whether unconstitutional conditions still prevailed.[40] The appeals court did not establish a clear standard—in fact, it indicated that no simple standard existed, given the various relevant factors, including costs—but the gist of the decision was that TDC would have time to try to work out a solution on its own.

Unfortunately for the litigants, their judges, and the people of Texas, the prison overcrowding problem exceeded the assumptions of the courtroom, and instead of solving it on its own, TDC had fallen well behind the curve. On May 10, 1982, with the circuit court's decision still pending, the Board of Corrections closed Texas prisons to new inmates for the first time. The stated reason was that the system was reported to be out of compliance with the square-footage requirements of existing court orders

[40] *Ruiz* 1982 at 1148.

(specifically the 40-square-foot requirement for dormitories, which was now in effect, as was TDC's commitment not to resume triple-celling).[41]

For the effects on Texas law and politics of the prison space shortage crisis, a fair analogy may be the global effects of the energy crisis that had begun a decade before. In each case, the established patterns of public and private life had come to depend upon expedient use of a scarce resource, and when the inevitable crisis finally came, it forced painful choices which would otherwise have been deferred or avoided. The only available options—expensive development of new resources, more sparing use of what was still available—challenged widely held assumptions of the public and disrupted the agendas of its representatives.

One inevitable response was to blame the broader problem on factors involved in the crisis. The prison litigation obviously did not cause the overcrowding itself, but it may actually have helped precipitate the crisis in more ways than one (the obvious one being the relevant court orders). With an election impending, Clements and White immediately blamed each other for the crisis, and both blamed the Board of Corrections, but the worsening situation had been no secret to any of them.[42] Still, their preoccupation with winning the court case had required them not only to demonstrate the unreasonableness of Judge Justice's orders but also to insist on the effectiveness of their

[41] The board also directed Estelle and TDC management to bring the system back into compliance and to "devise a plan to resume receiving prisoners in a manner to maintain compliance with the Court Order. Resumption of reduced admissions is anticipated within thirty days." Given the response to the announcement, the necessary releases were carried out much more promptly than that. See meeting minutes, Texas Board of Corrections, 5/10/82, Box 1998/038-26, Minutes and Meeting Files, Records, Texas Department of Criminal Justice, Archives and Information Services Division, Texas State Library and Archives Commission.

[42] For Clements' immediate response see letter, Gov. Clements to T. L. Austin, 5/12/82, in Box 38, Folder 2, General Counsel Records, 1979-1983, Clements Papers.

own measures to address an acknowledged problem—and to view "effectiveness" more in terms of the effect on the Fifth Circuit than on the underlying problem. During the regular session of the 1981 Legislature, Clements ordered the housing of 1,500 inmates in army tents and won passage of a "conditional parole" program allowing for the release of 1,500 more—all of which went toward immediate relief, since more than 3,000 inmates were then sleeping on floors.[43] Clements also obtained an emergency appropriation for $65 million for new prison construction (aimed at housing 2,800) and signed an amended version of a work-release program Estelle had advocated.[44] In the view of Tony Fabelo, who would soon take on a critical role as the state's leading criminal justice policy analyst, the 1981 measures were "cosmetic in impact because of their ineffectual design," which in turn was because of the underlying lack of rigorous or realistic projections of future prison admissions.[45] But they served the state's case before the appeals court, as well as the persistent effort, led by Clements, to peel the Justice Department away from the plaintiffs and settle separately with the department.[46] By late October 1981, officials on the Governor's staff were aware that new admissions were running above projections, parole releases were lagging, and construction of new facilities was running behind

[43] See memo, Johnny R. McCollum to David A. Dean, 8/6/81 (regarding "Status Report on Alternatives to Overcrowding at the Texas Department of Corrections), Box 37, Folder 23, General Counsel Records, 1979-1983, Clements Papers.
[44] The population figure for the emergency prison appropriation predated the 40-square-foot dormitory space requirement. McCollum estimated that at 60 square feet per dormitory inmate, the new prisons would only house 1,440 inmates. Undeniably the litigation hung heavily over all of the state's plans. See memo, McCollum to Dean, 8/6/81, Box 37, Folder 23, General Counsel Records, 1979-1983, Clements Papers.
[45] Tony Fabelo, "Making the Obvious Possible: Policy Research and the Building of Coalitions for Criminal Justice Reforms," *Crime & Delinquency*, Vol. 38, No. 3 (July 1992), p. 371.
[46] See "Position Statement (Selected Issues *Ruiz v. Estelle*)," position paper prepared by TDC, 10/15/81, Box 37, Folder 25, General Counsel Records, 1979-1983, Clements Papers.

schedule.[47] Yet the state continued to insist that it had the situation under control. A position paper submitted to the Justice Department boldly maintained that "the State of Texas and TDC have taken action that will provide long range assurance that overcrowding will not rise to unconstitutional dimensions."[48]

When the Board of Corrections closed the entrance gates, the charade could no longer be maintained.[49] With an election showdown looming over the governor's office, the effort to win before the appeals court was replaced with an even more intense, consuming preoccupation with reopening the prisons and keeping them from closing again before election day. Initially, Clements sent a letter denouncing the board for not consulting him and "directing" it to reopen the prisons. More productively, he presided over a feverishly assembled set of new front-end and back-end mechanisms. Working with the prison and parole agencies, his aides arranged for additional early releases and expedited reconsideration of past rejected parole applicants.[50] After releasing enough inmates to reopen the gates on May 17, TDC worked out a schedule of controlled

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[47] Memo, Johnny R. McCollum to David Herndon, 10/27/81 (regarding "Update on Overcrowding in the Texas Department of Corrections"), Box 37, Folder 23, General Counsel Records, 1979-1983, Clements Papers. Despite the deteriorating situation McCollum described, the main point of the memo was to prepare for a meeting between Clements, Estelle, and Board of Corrections members which was to focus on the negotiations with Reynolds. TDC itself reported entirely consistent findings in "An Analysis of Trends in TDC Population Growth and Housing," 3/11/82, attached to letter, W. J. Estelle to David Herndon, 4/13/82, Box 38, Folder 2, General Counsel Records, 1979-1983, Clements Papers.

[48] "Position Statement," *supra* note 46, p. 17. The paper actually cited litigation in Oklahoma involving metropolitan jail overcrowding resulting from new admissions restrictions by the state prison system. By comparison, "TDC does not anticipate burdening Texas counties with an overcrowding problem." This was drafted less than seven months before the Board of Corrections closed the Texas system to new admissions.

[49] Whether Clements and others were waiting out the appeals court while actually intending to address overcrowding any more candidly is unclear, but the likelihood seems dubious, given that the election showdown with Mark White also lay ahead.

[50] See letter, Ruben M. Torres (chairman, Board of Pardons and Paroles) to David Herndon, 5/12/82, and memo, Herndon to Gov. Clements, 5/13/82, Box 38, Folder 2, General Counsel Records, 1979-1983, Clements Papers.

admissions that set weekly ceilings for inmates from the sixteen counties that represented 70% of the state total.[51]

Clements also summoned a special session of the Legislature to pass new funds for prison construction. (The lawmakers agreed to provide $58 million—which promptly led to further dispute between TDC, which planned for a typical maximum-security unit prison, and Clements, who was intent on maximizing numbers of new beds and wanted to build less secure facilities.) He also announced the appointment of a "Blue Ribbon Task Force" to reconsider corrections policy and recommend a "master plan" to the next legislative session.[52]

During the rest of the year, through the fall campaign, the Governor and his aides nervously monitored the weekly population reports, intent on preempting any more ugly surprises. In July, the completion of three prisons (funded by the 1981 emergency appropriation) boosted capacity by nearly 3,000, relieving the immediate crisis and allowing TDC to set aside the county admissions ceilings.[53] But by late August, the Governor's general counsel, David Herndon, was already predicting that at prevailing rates of net admissions, the prisons would be full again by November.[54] Days later Herndon warned that TDC had had to postpone the completion of new prison unit space, thereby making a new crisis all but certain. He notified Clements that he had discussed

[51] David Herndon informed Gov. Clements of the negotiations between TDC and the counties in his memo, 5/20/82 (regarding "Most Recent Numbers on Prison Population, Admissions, and Releases"), Box 38, Folder 2, General Counsel Records, 1979-1983, Clements Papers.
[52] Executive Order WPC-45A, 7/6/82. A draft of the announcement text is in Box 23, Folder 31, Clements Campaign Records.
[53] David Herndon notes that the "controlled admissions" policy was kept in place for two months, in memo, Herndon to Gov. Clements, 9/23/82, Box 38, Folder 5, General Counsel Records, 1979-1983, Clements Papers.
[54] Memo, David Herndon to Gov. Clements, 8/25/82, Box 38, Folder 5, Clements Papers.

the situation with the chairman of the parole board and (subtly) had asked for projections of paroles in coming months, to be updated weekly. If the parole board did not raise its own numbers, the Governor himself would have to act to speed the flow through the back door.[55] Herndon was ultimately able to get the parole board to give early reconsideration to rejected parole applicants, which would head off the immediate crisis and allow time for more new capacity to become available early in the new year.[56]

Having staked his governorship largely on the politics of law and order, Clements was himself one of the first victims of the prison capacity crisis he and his predecessors had helped to create. The task of dealing with a crisis which would not end was passed on to his successors (which included, in yet another twist, Clements himself). Another legacy was the report of the blue-ribbon commission, which appeared in December 1982 during the interregnum following White's election victory.[57] Bruce Lipshy, a Dallas businessman hand-picked by Clements, led a group which seems to have been honestly selected to represent a broad range of views.[58] The commission's recommendations,

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[55] Clements replied, in handwriting, on his copy of Herndon's memo: "We need to discuss in more detail—we must NOT have a crisis in Oct.!" See Memo, Herndon to Gov. Clements, 9/7/82, Box 38, Folder 5, General Counsel Records, 1979-1983, Clements Papers.

Interestingly, one of the Plan B options Herndon suggested was to "have us, your parole office, become more lenient, i.e., grant a larger percentage of the paroles recommended by the Board." Clements was intent on forcing the parole board to raise its numbers of recommended paroles but, with the power of final approval, was unwilling to reduce his own rejection rate. As Herndon observed, getting the parole board to act on its own was "the best of the presently identified options because it is a change in Board policy, not your own."

[56] Memo, David Herndon to Gov. Clements, 10/1/82, and letter, Gov. Clements to Members of the Board of Corrections, 10/4/82, Box 38, Folder 5, General Counsel Records, 1979-1983, Clements Papers.

[57] Blue Ribbon Commission for the Comprehensive Review of the Criminal Justice Corrections System, *Preliminary Report to the Governor* (Austin: The Commission, 1982).

[58] The twenty-four commissioners included Johnny B. Holmes, Jr., Clements' appointee to replace Carol Vance as Harris County district attorney; Board of Corrections chairman T. Louis Austin, and influential legislators Ray Farabee (a moderate), Mike Moncrief (a liberal), and J. E. "Buster" Brown (a conservative Republican). Holmes, at least, was not part of the broad consensus reflected in the commission report. The commission papers (contained in Box 1991/063-35, Records, Criminal Justice Division, Office of the Governor, Texas State Library and Archives) require further study.

focusing mainly on diversions and alternatives to incarceration, suggest the traumatic quality of the prison overcrowding crisis as experienced by officials and observers from both parties. Clements had himself set the tone, and suggested the course, of the commission's work in his initial announcement: "In view of the enormous increase in prison population which has been projected for our state, I have come to the conclusion that we cannot continue to build and operate our prisons the same way we have been doing for the past 50 years."[59] A table at the front of the report divided the recommendations between those with direct and indirect effects on the overcrowding problem. The former category included expanded work furloughs, extension of good time grants and parole reviews, and other recommended changes that read like Judge Justice's orders.

Beyond adjusting existing policies to make them more lenient, the commission proposed two far-reaching new policy departures. One was a task force to study "sentencing guidelines and judicial sentencing." The rationale cited the persistent, gaping disparities in criminal sentences in different locales, and the "confusion and uncertainty" surrounding jury sentencing deliberations.[60] The other new policy was state subsidies for community-based alternative corrections, pending the success of pilot programs.[61] The committee tabled a recommendation for allocation of prison space based on population, crime incidence, and other formula factors. This proposal was "predicated on the fact that the state will not gain control of its prison population until a mechanism is developed to insure some control over the number of inmates it receives."

[59] Draft announcement, *supra* note 52.
[60] Blue Ribbon Commission report, pp. 35-36.
[61] Blue Ribbon Commission report, pp. 36-37.

Regarding the implications of gaining this control, the rationale was admirably forthright: "If accomplished, for the first time, the rest of the criminal justice system would have to respond to the space limitations of TDC and adjust their commitments accordingly. They would also need to develop community-based corrections programs that would handle their excess offender populations."[62]

In broaching the use of prison and jail capacity constraints as leverage against local sentencing practices, the blue-ribbon commission pointed to a possible way forward for criminal justice reform in the aftermath of the Fifth Circuit's defanging of *Ruiz*. In failing to give the idea the same endorsement it gave to alternative sanctions in general, the commission demonstrated the unlikelihood of implementing such a policy—at least through the political process. But the suggestion, having been made, pointed toward further battles in which the forms of punishment and the scale of imprisonment in Texas would yet be decided.

Without clear legislative priorities of his own, Governor Mark White allowed many criminal justice policies to be driven by other factors, which in some cases actually included research and expertise. Several far-reaching developments occurred, few of which flowed from the governor's own leadership. As the official formerly in charge of the state's defense in *Ruiz,* and a longtime harsh critic of Judge Justice (and an almost militant death penalty advocate), the former attorney general had maintained plausible law-and-order credentials of his own, but unlike with Clements, these were bona fides rather than tools of building a new political coalition. The political task constantly facing

[62] Blue Ribbon Commission report, p. 53.

White was to hold together liberal and traditionally conservative Democratic support, an unenviable challenge which helped to seal his reputation for cynical maneuvering. Perhaps because criminal justice politics wedged Texas Democrats farther apart instead of pulling them together, White shifted his focus to other issues (such as education reform) and, early on, surrendered the initiative to key legislative leaders (with the exception of the question of *Ruiz* compliance). In 1983, with the prison system closing still reverberating, and with the blue-ribbon commission report released just before the beginning of the session, the Legislature passed a remarkable array of bills that maintained the commission's fixed focus on prison overcrowding and alternative sanctions. For a highly unusual moment, lawmakers generally perceived the customary politics of law and order as having contributed to their immediate problems. Emboldened liberals and cost-cutting conservatives together slashed TDC's budget request for prison construction and provided large new sums to expand probation. There was even consensus support for early-release mechanisms, such as a sharp increase in the formula for granting good-time credits (from 30 to 45 days per 30 days served), and a procedure (the Prison Management Act) which gave the governor emergency powers to grant good time and advance inmates' parole eligibility when the total inmate population hit 95% of capacity.[63]

[63] The characterization of the 1983 legislative session and several of its more prominent criminal-justice bills draws upon the bill summaries in House Study Group, Texas House of Representatives, *Issues of the 68th Legislature, Regular Session, 1983* (Austin: The Study Group, 1983) and the House Study Group Daily Floor Report analyses of S.B. 727 (the Prison Management Act) and S.B. 640 (maximum good time for inmates), which include the floor votes in both chambers reflecting the absence of broad opposition. Tony Fabelo's analysis and interpretation is in "Making the Obvious Possible," at pp. 373-375.

Other products of this rare, brief interlude included renewed attention to sentencing policies and the creation of the Criminal Justice Policy Council staff as an influential research and analysis unit. The policy council itself was a well-intentioned experiment aimed at engaging the governor, lieutenant governor, and House speaker directly in long-term planning, but it almost never actually convened. Still, in order to fulfill the council's statutory charge, a small appropriation and a federal grant were used to create a planning staff.[64] The council staff's first major project was the creation of a statistical model (the CLASM, or Computerized Legislative Analysis System Model) which could generate valid projections of the impact of alternative policy proposals.

The Legislature's creation of a Commission on Sentencing Practices and Policies followed directly from the blue-ribbon committee's recommendation of a task force. For a new policymaking cohort, the work leading to the commission's 1985 report raised once again some of the issues Dean Keeton and his penal reform committee had confronted, such as the significance of sentencing disparities and the question of maintaining jury sentencing. The commission report also gave lawmakers an early chance to weigh the option of sentencing guidelines, which were being introduced and considered in several other states (and would soon be imposed on the federal courts) as a means of constraining discretion in sentencing. The commissioners were unwilling to endorse any bold new initiatives, but their reticence came in part from the absence of available data and their willingness to require supporting analysis of the kind that the

[64] See Fabelo, "Making the Obvious Possible," p. 374.

policy council staff was now able to offer.[65] Fabelo, who joined the council staff early on and helped develop the CLASM, later touted the staff's success in steering the sentencing commission away from proposals to lengthen minimum time-served requirements by demonstrating their impact on prison crowding.[66]

Moving on from its work for the sentencing commission, the policy council staff used its statistical model to project the continued growth of the prison population, assuming available space (which was not already in fact provided for).[67] The staff's March 1985 report on the Texas correctional system was in part an effort to call the attention of policymakers to the severity of their impending problems, and the urgency of making combined choices from among the options (such as more new prison space, expanded forms of parole, and other varieties of early release) that the council identified.

The report argued that since additional prison capacity would take at least two years to develop, front- and back-end population controls (as well as upgrades to existing facilities) would be needed in the short term to maintain a population cap. But these controls—diversion at the front end, early release mechanisms at the back—each came with particular problems, in terms of the workings of the system model but also in terms

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[65] One example: in declining recommend the development of sentencing guidelines for Texas (and recommending against mandatory guidelines), the commission report cited "the uncertainty of the results of statewide sentencing guidelines on the state criminal justice system." *Report*, p. 44. Another example: the commission's decisions on the question of sentencing disparities—citing the persistence of broad variations by race and by jurisdiction, while calling for further research—followed closely the conclusions of a study by the parole board staff. See "Variation in the Sentencing Process: A Preliminary Examination of Sentencing Disparity in Texas," presented by Michael Eisenberg, Board of Pardons and Paroles, October 1984, included in the sentencing commission report (Study 1, at p. 111).

[66] Criminal Justice Policy Council, *The Impact on the Texas Prison Population of Changes in Minimum Time Served for Parole Eligibility* (Austin, 1984), cited in Fabelo, "Making the Obvious Possible," p. 375. The council staff's report containing CLASM-based projections for other, less politically charged suggestions was included in the sentencing commission's report (Study 2, at p. 189).

[67] Pablo Martinez and Antonio Fabelo, *Texas Correctional System: Growth and Policy Alternatives*, CLASM Series of Policy Analyses, Report 060385, March 1985.

of broader political requirements. The early release mechanisms included parole, which could allow for refinements in selection criteria, and "mandatory release," which was the name for the policy, mandated by the Legislature in 1977, of releasing inmates whose calendar-time and good-time credits equaled the length of their remaining sentence. (The report did not address further legislative grants of "good time" credits, presumably reflecting a sense that this particular measure had been taken to its limit.) The intended message to policymakers was that they needed to use these programs carefully, in a controlled manner, with specific numerical targets, and with an awareness of the possible consequences. The one remaining back-end option, invoking the Prison Management Act, was arguably a proper last-ditch tool for an emergency, but since it was the least selective population tool of all, using it continuously would create maximum danger to the public.[68]

While it generally emphasized making carefully measured choices rather than specifically predefined ones, the council staff was willing to go out on at least one limb. On diversion, the report explicitly recommended "intensive supervision probation with the establishment of a prison admission quota system for major metropolitan counties."[69] TDC's "controlled admissions" policy, from the period after the May 1982 closing, created a precedent for a quota system. But, as the council staff dryly observed, "one of the critical implementation requirements for the success of this program is to assure the cooperation of the judiciary and county elected officials."[70]

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[68] The pointed assertion about the Prison Management Act was not part of the extended analysis but was contained in the executive summary. See *Texas Correctional System*, pp. v-vi.
[69] *Texas Correctional System*, p. 49.
[70] *Texas Correctional System*, p. 50.

The staff's arguments apparently carried weight with the governor and other legislators, but they could influence policy only so much. White's response to the dilemmas of prison population control was to make a point of never invoking the Prison Management Act. Instead, he managed the problem largely by presiding over high rates of parole grants and heavy use of mandatory release, based on the newly legislated formula for granting good time. For White, these methods were important because they involved no direct approval of early releases on his own part. Tony Fabelo viewed the problem as having been "expediently handled" rather than confronted and addressed in the ways he and the other policy council staffers had recommended.[71]

Expedient though his actions may have been, White appears to have felt politically trapped by the dilemmas of prison crisis management, as well as the actions of a prison board still controlled, for a time, by his predecessor's appointees. Overcrowding as an issue in litigation still needed to be settled, despite the appeals court's rejection of Judge Justice's relief orders, because the court had sustained Justice's original findings of unconstitutionality and had allowed the plaintiffs to seek a new hearing on remedies within a year of the ruling on the appeal. But no progress had been made on relieving the existing crowding problems, because policymakers had felt so hard pressed even to keep up with new admissions. The Clements appointees on the Texas Board of Corrections concluded that the state had little chance of escaping new remedial orders (which the

[71] Citing TDC annual report statistics, Fabelo later noted that total releases in 1986 rose 46% from three years before, largely because of a 53% increase in mandatory releases (from 2,143 to 3,283 three years later). Paroles granted were up a mere 39%. "Meanwhile, during this same period, reported index crime in the state increased by 33%." Fabelo, "Making the Obvious Possible," p. 376.

appeals court would be much less likely to stay or vacate), and therefore that they should finally settle the issue with the plaintiffs.[72]

A large part of the problem, as board members and other officials belatedly realized, was that the capacity numbers calculated by TDC drastically understated the actual crowding. Newly selected TDC executive director Ray Procunier, an experienced prison administrator chosen by the board (over White's objections) to succeed Estelle, visited all of TDC's unit prisons and observed lines of inmates, back from field work, having to stand outside, nude, waiting for long periods to use the few showers that were available.[73] Working toward a settlement, the board hired Henningston, Durham & Richardson (HDR), a major private consulting firm, to study TDC facilities, measure the overcrowding problem, and provide a credible basis for large new appropriations requests. HDR's team confirmed that the system was overcrowded by 35%, even by a set of standards devised by the consultants themselves that fell far short of those recommended by the American Correctional Association. Dining rooms were serving

[72] The view of Harry Whittington, board member and dedicated Estelle opponent, was also that since perjured testimony by state witnesses had come to light since the appeals court's ruling, the state could not afford to have the case brought back before the court and would have to try to settle all remaining outstanding issues. Whittington was willing to make this point in public. See Frank Klimko, "TDC witnesses lied during suit, group told," *Houston Chronicle*, 7/21/85. He expanded on his charges in a detailed briefing on prison matters that he gave to Clements during the 1986 gubernatorial campaign. In this briefing he cited perjury by state witnesses, the firing of six wardens by the Board of Corrections in the months after September 1983, "when Clements appointees took charge of the Board," and numerous other violations and disciplinary cases, all of which made the state's case unsustainable. See "Remarks of Harry Whittington to Clements Campaign Executive Committee on Texas Prisons," 6//7/86, pp. 3-4, in Box 74, Folder 22, Clements Campaign Records.

[73] Steve Martin, who continued under Procunier as TDC general counsel, observed that "Procunier could very well have become Turner's most effective witness if he were called to testify at the overcrowding hearing." He also claimed that Procunier's assessment "*for the first time* provided attorneys for the state with some concrete idea of the extent of overcrowding in the TDC" [my emphasis]. See Martin and Ekland-Olson, *Texas Prisons*, p. 240.

meals in shifts starting at 3:00 a.m. for breakfast and ending after 10:00 p.m., which still left some inmates only ten minutes to eat after receiving their trays.[74]

In settling the overcrowding issues, the board parted ways with the governor. Intent on avoiding hearings, which were scheduled to begin in February 1985, the board was able to win a postponement by citing the consultants' forthcoming findings, as well as a new TDC plan for holding several types of inmates (including mentally retarded and psychiatric cases) in single cells and releasing others who had completed special educational programs.[75] HDR's report, released in late February, acknowledged the extent of overcrowding and proposed $500 million in new facility expenditures simply to achieve compliance with their own "conservative" standards (which remained well below professional benchmarks) for the existing prison population. On top of that, the report recommended $369.3 million in new prison construction. The board voted to accept the findings, but, signaling his opposition to the board's course of action, White publicly took issue with the consultants, saying that he would not support "country club prisons." He even denounced the cell-allocation plan that had enabled TDC to head off the hearing, accusing TDC of giving excessively favorable treatment to mentally ill inmates. He also refused to reappoint Harry Whittington to the Board of Corrections when Whittington's term expired during the final settlement negotiations.[76]

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[74] Whittington, "Remarks," pp. 2-3.
[75] Whittington, "Remarks," p. 4.
[76] Whittington's comprehensive briefing to the Clements campaign executive committee emphasizes White's emerging opposition to the settlement effort but does not mention White's statement endorsing the settlement plan. His apparent assumption—that the stated endorsement was worth little—seems reasonable enough. Whittington also avoids discussing the circumstances of his own failed effort to win reappointment. For this see Martin and Ekland-Olson, *Texas Prisons*, p. 242.

White's resistance proved not to be an obstacle to a settlement agreement but was an ominous indication about his eventual willingness to enforce it. In the short term, the Board of Corrections and TDC completed a settlement agreement with the plaintiffs, and the Governor appeared to acquiesce in the outcome. The agreement, signed by the parties on May 16 and approved by Judge Justice two months later, set a population cap on each individual unit prison and required a reduction in the total population of units already existing, to be accomplished in two phases in 1987 and 1989, with a total depopulation of over 5,000. The state would have to spend some $200 million on two new prisons and ten trusty camps in order to avoid having to release the set number of inmates. Other provisions included minimum levels of security staffing, maximum population and minimum space requirements for newly constructed prisons, various renovations to physical plant, and annual quotas for clothes and linens per individual inmate.[77] The agreement permitted the continuation of double-celling, but in return required TDC to construct new recreational yards and extend the time allowed for double-celled prisoners to remain outside their cells.[78] The terms of many of these stipulations followed the standards and findings in HDR's report. After the agreement was announced, the Governor's office released a statement endorsing its terms. "Now maybe we'll get back to the business of running the prisons without continual litigation," the statement read.[79] Days later, the agreement was formally announced at a press conference at which Robert

[77] A copy of the settlement agreement is at Folder "Crowding settlement (stipulation), May 1985," Box 2004/016-61, Ruiz case files. A convenient summary is provided by Crouch and Marquart, *An Appeal to Justice*, at pp. 146-147. Also see Martin and Ekland-Olson, *Texas Prisons*, pp. 242-243..

[78] Whittington emphasized this point in his briefing document for Clements, arguing that the failure of White and his appointees to implement this part of the agreement was especially flagrant. See "Remarks," p. 7.

[79] Mary C. Bounds, "Texas prison board approves plan to settle suit," *Dallas Morning News*, 5/14/85.

Gunn, the chairman of the Board of Corrections, declared that "the war is over." White declined to appear at the press conference, although he reiterated his support for the settlement at a separate news conference that same day. [80]

As White's appointees asserted control of the Board of Corrections and TDC, the Governor's unwillingness to associate himself with the overcrowding settlement escalated into a refusal to bear the expenses of its terms, which placed the state on a collision course with Judge Justice. Six months after Chairman Gunn's declaration, William Bennett Turner, the longtime lead counsel for the plaintiffs, filed a motion charging TDC with contempt and citing obvious instances of noncompliance with the settlement terms. When TDC officials and state attorneys worked out a new settlement with the plaintiffs to head off the contempt motion, White publicly repudiated it and forced the board to do likewise, singling out a provision to allow television sets in cells which had already drawn public criticism.[81] As the 1986 campaign rematch between White and Clements unfolded, Judge Justice held the necessary hearings on the contempt motion. As one editorial commentator observed, the visible futility of White's legal campaign made its political purpose equally apparent—"to talk tough and hope the final judgment day in court could be postponed until after election day."[82]

For all the criticism that White justly reaped for his transparent maneuvering, his actions reflected both legitimate political considerations and genuine policy dilemmas. Given the intense partisan animosity that divided the White and Clements camps, it was

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[80] Mary C. Bounds, "Prison suit accord signed," *Dallas Morning News*, 5/17/85.
[81] See Raul Reyes et al, "Governor against TV in cells," *Houston Chronicle*, 5/16/86, and Jan Rich, "Prison board votes for another court fight on overcrowding issue," *Houston Chronicle*, 6/12/86.
[82] Scott Bennett, "White fumbled prison football," *Dallas Morning News*, 10/30/86. Martin and Ekland-Olson echo the prevailing view of White's political motivations in *Texas Prisons*, p. 243.

hardly unreasonable for White to be suspicious of a prison board controlled by his predecessor's appointees, and their sudden, belated determination to make unpopular concessions to the plaintiffs and Judge Justice. Moreover, circumstances and available policy choices—rising prison commitments, risky early-release options, and a court settlement that reduced already scarce prison space—presented dilemmas that were ultimately beyond the Governor's ability to manage politically. Attacking the federal court reflected at least an arguable appreciation of the source of his problems. Like his predecessor, White left his successor both a source of professional counsel and a set of unresolved dilemmas.

Chapter 4

"Treatment Culture" and its Discontents: A Policy History of Texas Juvenile Confinement

The history of responses to youth crime in 20th-century America was one of constant conflict, despite the appearance of a progressive consensus prevailing until recent decades. The conception of juvenile delinquency as distinct from adult crime, and the creation of separate institutions of juvenile justice, rested on the principle of the young offender's diminished responsibility and the priority of rehabilitation over punishment. Child-savers of the Progressive era sought to turn around young lives both through applying new mechanisms—the juvenile court, probation, individualized treatment—and through adapting already-existing institutions. Old reformatories were rebranded as training schools and assigned to provide psychiatric care as well as academic and vocational instruction. But even while Progressive juvenile justice and its ideals still commanded prestige, a host of other influences shaped the system in practice and fueled unending struggles over its workings. Given unlimited discretion to act in the child's best interests, judges freely expressed their own biases or those of their public supporters. Probation officers generally were burdened with caseloads that ruled out meaningful supervision. Institutions tasked with rehabilitation often remained preoccupied with maintaining secure custody, as well as their own peculiar traditions.

In keeping with rising public skepticism, historians have viewed the development of professional care as reflecting the biases, and serving the interests, of increasingly powerful, authoritative providers.[1] But in Texas, among other places, making state institutions offer care rather than punishment has always been an uncertain errand. The history of struggle over delinquency in Texas illustrates the limits, as well as the power, of professionalizing reform prompted by federal court intervention. Having been an object of fear and a threat held over the head of young offenders for generations, the network of state reform schools centered in Gatesville was made nationally infamous in 1973 by the case of *Morales v. Turman*, which revealed patterns of abuse in virtually all aspects of institutional life. While the reforms initially ordered by the court were set aside on appeal, the litigation did ultimately yield a settlement which required the facilities to meet some professional standards. But the case was neither the beginning nor the end of the battle over the handling of children in state custody. Before, during, and after the litigation, advocates of therapy for delinquent youths faced a struggle for influence over state institutions (and, especially most recently, for the protection of what they had managed to gain).

Recent coverage has brought intensive group therapy for violent juvenile offenders in Texas to the attention of a general audience.[2] Even in punitive Texas, state administrators responsible for juvenile institutions have long sought to build legitimacy

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[1] See Anthony Platt, *The Child Savers* (Chicago: Univ. of Chicago Press, 1969); Steven L. Schlossman, *Love and the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice, 1825-1920* (Chicago: Univ. of Chicago Press, 1977) ; and John R. Sutton, *Stubborn Children: Controlling Delinquency in the United States, 1640-1981* (Berkeley: Univ. of California Press, 1988).

[2] John Hubner, *Last Chance in Texas: The Redemption of Criminal Youth* (New York: Random House, 2005). Hubner describes group therapy in the Capital Offenders Therapy program at the maximum-security Giddings facility, and sensitively portrays the individual participants.

by publicizing their rehabilitative mission. For some years this meant maintaining a façade of professionalism, even while budget constraints precluded real reforms. After the *Morales* ruling, this investment in therapeutic rhetoric, as well as judicial pressure, enabled reform-minded agency leaders to undertake new programs and make genuine changes in institutional life. But their efforts to limit the institutionalized population and force judges and communities to make local placements left the agency politically exposed when crime rates and commitments spiked in the late 1980s and early '90s. By the turn of the century, the Texas Youth Commission, with its 5,000 wards, and a newly expanded array of institutions imposing regimentation and other forms of strict discipline, amounted to an accommodation among advocates of professional treatment, judges seeking broad authority to punish and incapacitate, and elected political leaders and organizations capitalizing on punitive sentiments. Under these conditions, "treatment culture" survived, but one of its defining principles—the preference for the "least restrictive means" of confinement—has been not merely abandoned but turned on its head. Both therapeutic and punitive quests for control over individual wards now compound and intensify each other.

"Texas citizens should take pride in the fact that the state's training schools now have and deserve a high rating," declared Austin MacCormick, one of the nation's best-known penal reform advocates, in 1964.[3] MacCormick, the longtime director of the New York-based Osborne Association, was remembered in Texas for having authored a

[3] Letter, Austin MacCormick to Robert W. Kneebone, October 1964, excerpted in *Annual Report for 1964*, Texas Youth Council, p. 5.

critical report on the prison system in the 1940s which prompted efforts at reform and modernization. In later decades, his returns to the state became occasions for publicizing the progress of Texas prisons under enlightened leadership. Using MacCormick in the same way, the Texas Youth Council sought to establish its own image as a modern service agency that had overcome its unsavory past.

For critics of reform, in criminal justice as in other realms, blaming unintended outcomes on the failure to implement agendas fully seems a lame excuse, betraying an unwillingness to engage in self-criticism. But the grim conditions of juvenile confinement in Texas as revealed in the *Morales* case clearly had little to do with any actual reforms. Instead, the role of advocates and providers of treatment was largely to help build and maintain the appearance of a professionally oriented system. They acquiesced or, like MacCormick, actively participated in decorating the façade, in some cases seeming to calculate that this would allow at least for gradual progress. In effect, professionals served as enablers, allowing state leaders to neglect delinquent children, and training school staff to abuse them, without being held to account. The silver lining was that the façade of rehabilitative care served to promote the idea of rehabilitation as an attainable purpose and as the basis for the system's legitimacy.

The use of progressive labels for harsh practices reflecting local traditions characterized juvenile justice in Texas from the very beginning of the system. Recent scholarship revisiting the origins of the juvenile court in Chicago has shown that features later seen as integral to an original vision of Progressive juvenile justice, such as private

adjudication hearings, actually developed over time in response to local circumstances.[4] Developments in Texas further illustrate the extent of divergences among regions which were supposedly caught up in the same Progressive currents. The Juvenile Court Act passed by the Texas Legislature in 1907, which defined delinquency legally and granted modified procedures to district and county courts acting as juvenile courts, was clearly intended by its leading advocates as an extension of guardianship, replacing criminal procedure and criminal liability with adjudication aimed "at the interests of the child and its reformation."[5] But, as researchers ruefully observed in the 1930s, legislative tinkerings and state appeals court rulings actually served to reaffirm and extend the older practice of trying youths as criminals, and sending them to Gatesville as punishment.[6] Instead of saving children from prosecution, the delinquency statute and the mechanism of juvenile court gave judges new tools to use against disorderly youngsters.[7] Juvenile probation, in urban counties that actually funded probation services, similarly served the

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[4] See David S. Tanenhaus, *Juvenile Justice in the Making* (New York: Oxford Univ. Press, 2004), esp. chapter 2.

[5] General Laws of Texas, 1907, excerpted in Luther E. Widen, *Juvenile Court Law Enacted by the Thirtieth Legislature* (Austin, 1907), p. 11.

[6] The ruling of the Texas Court of Criminal Appeals in *Byrd v. State* (1909) upheld an unrepealed 1889 statute which allowed courts to sentence defendants aged sixteen and younger to the reformatory. In this interpretation, the Juvenile Court Act merely created an additional option for processing juveniles. Later legislation required transfer of children's cases to juvenile courts, but apparently "reverted to terms and procedures strongly suggestive . . . of the criminal law." See *Texas' Children: The Report of the Texas Child Welfare Survey* (Austin: Bureau of Research in the Social Sciences, University of Texas Publication No. 3837, Oct. 1, 1938), pp. 184-190 (quote at 190). In *Watson v. State* (1922), cited in *Texas' Children,* the Court of Criminal Appeals stated that the juvenile court law "was designed not that one should escape punishment for crime, but to prevent one under seventeen at the time of trial from being sent to the penitentiary." Alan Rucker's recent treatment surveys rulings and prior research without further accounting for the use of criminal procedure in juvenile courts. See Rucker, "The History of Juvenile Justice in Texas Prior to 1943," *State Bar Section Report: Juvenile Law*, Vol. 7, No. 4 (Dec. 1993), pp. 41-49.

[7] Juvenile court criminal procedure maintained judges' control over outcomes, much as guardianship courts did. While criminal procedure included a right to trial by jury, the researchers who assembled *Texas' Children* found that nine of every ten children tried in Texas for delinquency in 1933 supposedly waived this right. See *Texas' Children,* p. 212.

criminal court rather than the juvenile. Probation officers typically acted as prosecution witnesses, and in Dallas a probation officer even filled the role of prosecuting attorney.[8]

The prison system's "House of Correction and Reformatory" founded at Gatesville in 1889 was renamed a "State Juvenile Training School" in 1911, but like the juvenile courts it served, its actual operations remained resistant to reform influences and, if anything, became more deeply so over time. Set up as a prison farm located near a small, out-of-the-way central Texas county seat, it spared young male offenders from the penitentiary, but its conditions were primitive and slow to improve. L. J. Tankersly, a newly appointed assistant superintendent, reported in 1900 that "there were no funds available for operation, that [his] predecessor had left no records, that the buildings were in deplorable condition, and that there was no segregation of races as instructed by the Legislature. Overcrowding was a big problem. There was no room to isolate younger boys from the older nor the sick from the well, and a number of pneumonia cases were being treated in hallways."[9] Given minimal appropriations and no facilities for instruction in trades, Tankersly and other superintendents kept the institution focused on farm labor, trying to cover expenses while keeping the boys occupied. Supervision was passed from the prison system to other officials and, in 1920, was assigned to a new State Board of Control. In its first annual report the board counted no fewer than 822 boys at Gatesville (compared to 183 inmates in 1900, when Tankersly cited overcrowding).[10]

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[8] *Texas' Children,* p. 210.

[9] *Report of L. J. Tankersly, Assistant Superintendent of the House of Correction and Reformatory, Gatesville*, included in *Annual Report of the Board of Trustees and Superintendent of the House of Correction and Reformatory*, 1900, cited in *Juvenile Delinquency in Texas: Incidence, Laws, and Services*, prepared by the staff of the Texas Legislative Council (Austin, 1954), p. 281.

[10] Population figures from August 31, 1920, in *First Annual Report of the State Board of Control to the Governor and the Legislature* (Austin, 1921), p. 105.

While variations in local crime and policing patterns might have contributed to the increase, the general effect of the delinquency statute and the juvenile court seems all too clear.

The rising tide of commitments of delinquent boys became an endlessly recurring source of tension between local courts and Gatesville superintendents. Both felt severe, chronic budget constraints. Judges in most Texas counties had no probation services and no detention facilities separate from the county jail, and often felt compelled either to sentence delinquents to the training school or to leave them in home situations which seemed even worse. Gatesville superintendents, facing chronic overcrowding and unable to control intake, appealed for the prevention of delinquency within schools and communities.[11]

By the 1920s, the Gatesville school was one of several children's and other eleemosynary institutions overseen by the Board of Control. These included a newly created school for delinquent girls, as well as an orphanage, a home for "dependent and neglected" children, and previously established schools for blind, deaf, and disabled youths. The Girls' Training School was authorized by the Legislature in 1913 aopened three years later at Gainesville (another fairly isolated location, near the Oklahoma border). Its first superintendent, Carrie Weaver Smith, M.D., recruited a staff of college-educated women and envisioned an intensive program of education, training, moral instruction, and medical care. "A training school should be recognized first as a

[11] A good example is Gatesville superintendent A. W. Eddins' address to a state teachers' convention in 1914, in which he scolded educators for lax discipline and enforcement of compulsory attendance, lack of moral instruction, and a dearth of honest manual labor. "Assails Schools for Neglect of Delinquent Boys," *San Antonio Express*, 11/29/1914.

hospital," she proclaimed, and in her first report to the Board of Control she explained the need for acute care ("An average of one third of our girls have venereal infection") and long-term treatments such as "occupational therapy, music therapy, hydro-therapy, and corrective gymnastics."[12] She resigned in 1925 after bitter disputes with board members over institutional expenses, and her successor immediately began cutting costs per student as the population swelled.[13]

The Board of Control itself was a pure example of Southern business progressivism in state government. Its main object was "the development of more efficient business methods in the management of the various State institutions and the realizing of a great saving by competitive buying in large quantities in the open market."[14] But, cheaper supplies notwithstanding, eleemosynary institutions reaped few benefits from the board's direction. In 1932 a comprehensive study of state government operations by outside consultants observed that the board members had neither "any actual experience or training for the administration of the institutions" nor sufficient staff or facilities for the job. Lacking any long-range plan for reducing demand for state services, their whole policy amounted to "effecting immediate savings in the per capita

[12] "Report of Superintendent," Girls' Training School, in *First Annual Report of the State Board of Control to the Governor and Legislature of the State of Texas*, fiscal year ending August 31, 1920, pp. 121-122.
[13] In reporting on the period from 1924 through 1926, the Board of Control cited the Gainesville school as, until recently, the institution with the most difficult problems: "It appeared almost impossible to harmonize theory and practice; idealism and results." Now, the board reported, "we know that some of these problems during the past two years have been greatly minimized, if not entirely eliminated," citing an improved "business side," better discipline, and better relations with the local community. The new superintendent, Mrs. Agnes Stephens, briefly described a school program that emphasized vocational training ("The laundry is one of the most important departments on campus") almost exclusively. The enrollment was up from 56 in 1923-24 to an average of 109 in 1925-26. See *Third Report of the State Board of Control*, pp. 16, 125-127.
[14] *First Annual Report*, p. 8.

cost of maintenance."[15] The consultants were most critical of the impact of stringent policy on state mental hospitals, which failed to recruit good doctors and continued to provide "custodial care at the expense of modern curative measures."[16] The Gatesville school, in its way, did the same thing. The consultants noted approvingly that the senior officers at the school were committed in principle to rehabilitation over punishment, and that recently "corporal punishment has so decreased and the morale of the boys has been so increased, that, if given their choice between whipping, having their hair cut short, or having their offenses go on record, they will usually choose the whipping."[17] But despite such leniency and good intentions, none of the staff had any training with rehabilitative methods, or any experience outside of the Gatesville school itself. For this reason, and because of "the urge of the Legislature and the Board of Control that expenses be kept as low as possible," the consultants acknowledged that the institution would stay focused on "productive labor," although they hoped that "rehabilitative features" could be adopted where possible.[18]

As years went by without improvements, the isolated schools became recurring sources of scandal, which attracted growing attention during the wartime wave of public concern over delinquency. In August 1941, the Board of Control fired the Gatesville superintendent, Earl H. Nesbitt, for alleged acts of brutality. Days later, a mass breakout occurred, with forty-seven boys successfully escaping. A legislative investigating

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[15] State of Texas Joint Legislative Committee on Organization and Economy, and Griffenhagen and Associates, *The Government of the State of Texas, Part VII—Public Welfare; Eleemosynary Institutions and Social Service Agencies* (Austin, 1932), pp. 2-3. Referred from henceforth as Griffenhagen Report.
[16] Griffenhagen Report, p. 2.
[17] Griffenhagen Report, p. 250.
[18] Griffenhagen Report, p. 250.

committee found evidence that the boys had been beaten with "bats," rubber hoses with handles that had been been banned from the adult prison system. Firing back at press coverage of the scandal, a local editor accused politicians of using the Gatesville school as a football, and said that if superintendents were "left alone by self-seeking investigators and big daily newspapers, they could probably get the job done."[19] Amid this controversy the board also replaced the Gainesville superintendent, citing grim conditions there as well: a lack of training programs, no trained social workers or psychologists, no proper classification of inmates, a diet of peanut butter sandwiches and water.[20] Standing legislative committees on eleemosynary institutions made return visits to the training schools for the rest of the decade, citing new examples of abuse and neglect, and the Legislature passed a restriction on corporal punishment (which Gatesville staff proceeded to disregard).

A spike in delinquency rates actually coincided with a sharp decline in the Gatesville inmate population, from 767 in August 1940 to 540 in May 1943.[21] After the war, numbers of cases in juvenile courts remained above prewar levels while the training schools dwindled further. In 1948 the Gatesville figure stood at 366. One reason, according to a state commission, was that "many judges appear unwilling to commit to the State School because of the stigma attached to a Gatesville boy."[22] The stigma itself

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[19] *Dallas Morning News*, 9/16/41.
[20] *Dallas Morning News*, 11/4/41.
[21] *Tenth Biennial Report of the Texas State Board of Control*, biennium ending August 31, 1940, population figure cited in report on p. 66, and "Report of Committee on State Eleemosynary and Reformatory Institutions," *House Journal*, 48th Legislature, May 6, 1943, p. 2824. For Texas wartime delinquency rates see report of study by the Texas Social Welfare Association and Texas Probation Association, cited in *Dallas Morning News*, 3/29/43.
[22] Texas Training School Code Commission, *Child by Child – We Build a Nation: A Youth Development Program for the State of Texas* (Austin, 1949), p. 12.

was nothing new. But in a time of widespread public fears of youth crime, an institution that promoted recidivism rather than curing it seems to have been viewed as part of the problem.

Reprising their role during the past age of Progressive reform, women's organizations took up the renewed cause of bringing Texas juvenile justice up to national standards.[23] The Texas League of Women Voters pushed forward a reestablishment of juvenile courts that changed criminal proceedings to civil and finally endorsed the principle of guardianship for delinquents.[24] Seeking to introduce child-saving practices long established elsewhere, the legislation included provisions allowing for closed hearings and informal procedures, broad dispositional authority for judges over delinquent youths, and the exclusion of juvenile court records from adult court proceedings. The bill was passed in 1943. Meanwhile, in Dallas, state district judge Sarah T. Hughes stirred a local controversy over the detention of juveniles alongside adult offenders in the county jail, and led a successful effort to win funding for a separate juvenile facility.[25]

With the reputation of state juvenile institutions now reflecting on the state itself, the effort to improve their image now began in earnest. Corporate attorney Beauford H. Jester, whose triumph in the 1946 governor's race confirmed the political dominance of a corporate establishment, sought in various ways to show an enlightened approach to state

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[23] On women's leadership in Texas Progressivism see Elizabeth York Enstam, *Women and the Creation of Urban Life: Dallas, Texas, 1843-1920* (College Station: Texas A&M Press, 1998).
[24] Sarah T. Hughes, one of the advocates for the legislation, describes its provisions and cites the League's support in "Handling of Juvenile Delinquents in Texas," *Texas Law Review* 38: 2 (1960), pp. 293-295.
[25] Darwin Payne, *Indomitable Sarah: The Life of Judge Sarah T. Hughes* (Dallas: SMU Press, 2004), pp. 114-117.

needs.[26] He got the Legislature to authorize (albeit without funding) a Texas Training School Code Commission, which was to prepare a report and proposals for the next legislative session.

The commission followed the path of other investigators and discovered many of the same defects at the schools: aging structures, barren living conditions, work routines determined by "the demands of maintenance and production." While it discovered no new disciplinary abuses, the commission's report went beyond its predecessors in citing the "insoluble problem" of maintaining discipline at a "mass custody" institution, which threw together different kinds of youths:

> It thus forces the entire staff to be first of all guards and it divides the population inevitably into the watchers and the watched. Life becomes an endless series of countings, of unlocking and relocking doors, of forming lines to go to classes, to work, to eat, to play. As always under repression, the human spirit rebels, plots endlessly to escape. In turn the administration introduces more "discipline" and this degenerates sooner or later into brutality.[27]

The commission report also bluntly reported on the inability of the schools to serve basic functions in the absence of professional staff. The training schools were unable to classify incoming children because they "lack most of the technically trained personnel—psychologists, psychiatrists, social workers—essential to make a competent diagnosis. The salaries offered are simply too meager to secure them."[28] The Gainesville school continued to treat girls for venereal disease, but that was the only remedial medical

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[26] George Norris Green's portrayal of Jester's governorship notes his support for the Gilmer-Aikin school bill and cites his "relative moderation" among conservative leaders of the time. See *The Establishment in Texas Politics: The Primitive Years, 1938-1957* (Norman: Univ. of Oklahoma Press, 1979), chapter 8.
[27] *Child by Child*, p. 22.
[28] *Child by Child*, p. 14.

treatment offered at any of the schools. Gatesville had only thirteen schoolteachers for its nearly 400 students. For children being released, neither training schools nor home communities provided any meaningful parole supervision. Regarding the employees that the schools did manage to hire, the commission tried to make its point delicately:

> In view of the uninviting conditions of employment, the Schools, particularly Gatesville, have difficulty in filling vacancies. Gatesville recruits its employees largely from the neighboring community and very often has to employ both husband and wife. This naturally transforms the institution into a very closely knit community.[29]

The commission offered two main recommendations. One was to create a diagnostic center for youths being sent to the training schools. This facility would screen out children needing other institutional care (such as the "feeble-minded and psychotic") and would also diagnose "the particular personality defects, assets, and needs" of the training-school-bound students, so that they could also be prescribed an individually suitable course of treatment. This would require a doctor, a clinical psychologist, a social worker, "plus competent supervisors and teachers to keep the child occupied and to observe his behavior," and a psychiatrist.[30]

The other recommendation was to create a Youth Development Council to control the disposition of all individuals committed to the state for delinquency. The commission's plan was based on a model Youth Correction Authority Act published in 1940 by the American Law Institute (as well as the commission's extensive consultations with the Institute's staff). The point of the model statute was to give one agency both the

[29] *Child by Child*, p. 25.
[30] *Child by Child*, p. 26.

responsibility for treating delinquents and the legal authority to control them.[31] The commission's proposed statute followed the model in giving the state youth council full discretion to hold, discharge, or conditionally release an individual offender, as long as it carried out an initial examination (hence the new diagnostic center) and periodic reexaminations, up to the offender's 21st birthday. Granting this much authority to the youth council was potentially controversial, as the commissioners undoubtedly were well aware; a recent *Texas Law Review* article supporting the model statute had addressed several potential legal challenges under the Texas Constitution.[32] In its published report the commission avoided discussing the extent of the council's discretion, and instead described the council's mandate as "coordination of the various programs within the State into one development program for all of the people of the State," with the additional duty of running the training schools.[33]

Tailoring their proposal to anticipate lines of opposition, the commission and its supporters succeeded in passing it intact in all but one crucial respect. Setting aside the model statute, the commission structured the Youth Development Council so as to avoid creating another state agency. It was to have no budget line of its own. A majority of its members were *ex oficio* heads of other state departments and agencies, and for staff it would mainly draw upon the resources of departments such as Public Welfare. Its role in local communities would be largely to promote the creation of municipal youth development councils to work out their own plans and programs. The report assured

[31] Tom B. Rhodes, Tom McLeroy, and Robert E. Burns, "Adolescent Delinquency and Youth Correction Authority Act," *Texas Law Review*, Vol. 20, No. 6 (1942), pp. 754-763.
[32] Rhodes et al, "Adolescent Delinquency," pp. 757-763.
[33] *Child by Child*, p. 31.

readers that the council "in no way takes powers from the courts, or competes with them," because judges would remain free to decide whether to commit delinquents to the state.[34] In steering the bill through the Legislature, Governor Jester and his aides countered charges that the proposed council intruded upon local responsibilities, and allowed themselves to portray it as virtually cost-free. "The philosophy of this plan is to mobilize EXISTING resources of the State which can be used in a State-wide youth development program," wrote one of the governor's staffers. "By using field staffs and State organizations of existing State agencies, it will be possible to provide these services to children and youth of Texas at minimum cost."[35] Minimizing the cost may have helped pass the bill at the expense of its intended purposes. The staffer's note acknowledged that Jester would seek to include additional budget requests totaling $150,000 in the eleemosynary appropriations bill. This figure was already only half of what the incoming Youth Development Council members believed they needed solely to run the diagnostic clinic. In the end, the council got all of $33,000 for diagnostic services, none of which could be used for salaries.[36]

At its beginning, the new council appeared—at least to some—as part of a genuine process of reform. As their remarks on "mass custody" institutions had suggested, Walter Kerr and several other council members who had served on the commission wanted to close Gatesville and replace it with smaller schools in other

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[34] *Child by Child*, p. 32.
[35] Bill digest attached to memo, William L. McGill to Gov. Beauford Jester, 4/27/49, folder "1949 Correspondence, Youth Development (Apr. thru May), Box 4-14/78, Papers of Gov. Beauford H. Jester, Archives and Information Services Division, Texas State Library and Archives Commission.
[36] *First Annual Report of the State Youth Development Council of the Governor*, fiscal year ended August 31, 1950, p. 50.

places.[37] But this was only part of the picture, as the minutes of the Youth Development Council's meeting on March 15, 1951 indicate:

> Rev. Kerr stated that he feels as our work develops, there will be less time spent in proportion on administrative matters and on the details of handling routine duties, and more will be spent on education, prevention, and cooperative work in communities. He thinks we should eventually be in a position to develop and control public opinion in matters pertaining to youth work.[38]

Kerr and other council members wanted to use the council's statewide coordination mandate to influence juvenile justice within communities. They mapped out a program in which a statewide director and regional field representatives would survey local facilities, act as consultants to local judges and community boards on juvenile services, and provide probation and placement services in areas without local services.[39] Then, in 1953, the Legislature omitted the community service program from the council's appropriations bill. The same fate befell the council's effort to carry out their underfunded diagnostic-center mandate. Unable to pay for a building, the council arranged a "mobile clinic," consisting of a clinical psychologist and two other trained specialists, which carried out diagnostic tests on children at the request of judges, mostly in communities without probation or other services.[40] The diagnostic-services funds were cut off in 1951. "The result," according to a 1954 legislative staff report, "is that there is no control over intake at the institutions, and with few exceptions, they receive every

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[37] Also see *First Annual Report*, p. 39.
[38] Minutes, State Youth Development Council, 3/15/51, Texas Youth Commission Records, TSLA.
[39] See *First Annual Report*, pp. 2-11, *Second Annual Report of the State Youth Development Council to the Governor*, fiscal year ended August 31, 1951, p. 5; and *Juvenile Delinquency in Texas*, pp. 336-338.
[40] See *First Annual Report,* pp. 49-60; *Third Annual Report of the State Youth Development Council to the Governor*, fiscal year ended August 31, 1952, pp. 39-46; and *Juvenile Delinquency in Texas*, pp. 339-341.

child committed to the council. Actually, the old admission practices have changed very little except for the technicality of the old commitment papers' specifying the council instead of the training school."[41]

The council remained caught in its original dilemma, as implied in its creation by the Legislature. It could not spare resources or attention for the cause of reforming institutional practices, or reshaping the practices of local juvenile courts, while at the same time managing its immediate responsibilities for the institutions. Despite Rev. Kerr's hopes, the "routine duties" of keeping the training schools running actually amounted to a major challenge, given the circumstances at Gatesville which the commission report had fairly candidly disclosed. Beyond the isolation, the rundown facilities and even the excessive size of the population, the key problem with the Gatesville school, in the council's view, was its lack of student classification and facilities for keeping students separated into groups (except for the segregation of black students). Daily life at the school, as the council reported, remained dominated by the children being thrown together *en masse*: "All the boys eat in one large, barn-like mess hall and all must eat with a spoon because a few cannot be trusted with knives and forks."[42] Urged on by its newly hired Gatesville superintendent, the council prepared a formal request to the 1951 Legislature for funds to split up the school into four separate units, differentiated by graded levels of security, and all housed in newly built small cottages. Instead, the Legislature passed appropriations for one large building, intended as a maximum-security facility, and renovations at Gatesville. Council members argued

[41] *Juvenile Delinquency in Texas*, p. 341.
[42] *First Annual Report*, p. 28.

with each other over uses for the new building, which opened in 1954 as a reception center for new arrivals.[43] The diagnostic-services budget may have been a casualty of the building appropriation's degree of success.

While the Legislature may have been inclined anyway to favor brick and mortar over newfangled initiatives, another likelihood is that council members themselves prioritized their facility construction requests because of the instability and danger of the status quo at their main institution. The most politically damaging issue that Gatesville posed for any of its supervising agencies was the problem of boys escaping the premises and allegedly threatening the safety and property of local residents. Individual and group breakouts were a familiar part of the school routine. The guard staff kept a pack of hounds—not bloodhounds but "a mixture of greyhound and regular old coon dogs," according to one official—to track and chase boys down in the surrounding woods and on the streets of the town.[44] Upon assuming control of the school, the council members found that "the situation at Gatesville was such that any change of policy or personnel upset the daily routine to such an extent that an epidemic of runaways usually resulted."[45] Feeling directly exposed to these epidemics, with runaways stealing their cars and coon hounds jingling across their lawns, Gatesville residents blamed outside authorities for forcing guards to be overly lenient. With Hispanic and black youths together composing a substantial majority of boys at the school, racial fears undoubtedly sharpened town feelings. In 1949 a local grand jury cited a rash of local incidents and declared, "As long as those who make the rules for the governing of this school fail to recognize that bad

[43] *Juvenile Delinquency in Texas*, p. 296.
[44] Bob Bray, "Boys Learn Walls at State School Enclose Own World," *Amarillo Times*, 11/2/48.
[45] *First Annual Report*, p. 28.

boys must be disciplined, it is our opinion that these raids and resulting escapes will continue."[46] Whether or not their diagnosis was correct, the grand jury's prediction was borne out over the years that followed.

If the institutions were to be brought under control, it was obvious that they would have to be expanded further. As juvenile crime spiraled during the 1950s, commitments rose rapidly and Gatesville's population rose past its former levels.[47] Anticipating a crisis, the Youth Development Council actually recommended a reorganization of itself in 1957 that would set free the heads of other agencies and pare the membership down to three gubernatorial appointees. After signing the reorganization act, Governor Price Daniel chose businessmen (Houston bank vice-president Robert Kneebone, Round Rock car dealer Louis Henna, and, in 1959, Dallas real estate developer W. C. Windsor) who would be more likely to carry weight with legislators. The renamed Texas Youth Council made a long-range plan for additional facilities (including the old school and the facilities built by the Youth Development Council) and, over the course of three successive biennial budget cycles, obtained the necessary funding. By 1962 the Gatesville school had become a complex with six separate "schools" for boys grouped by age and degree of aggressiveness. The largest of these was still the original reformatory building, now dubbed "Hilltop School," which housed older boys whose IQ tests placed them in between students considered mentally retarded ("Terrace School" was reserved

[46] "Escapes at Gatesville School Blamed on Board's New Rules," *Waco Tribune-Herald*, 6/12/49.
[47] The perception of a building crisis over juvenile crime is reflected in press clippings and in state official correspondence. For a sign of the preoccupation with the issue among Gov. Price Daniel and his office staff see typed table, "Houston, Harris County, increase in juvenile crime, 1957 over 1956," Box 351, Records of Governor Price Daniel, Texas State Library and Archives Regional Records Center, Liberty, Texas. By January 1958 the Gatesville population was near 850 and the school was "bulging at the seams." See Felton West, "Average Stay of Boys in State School Is Under One Year," *Houston Post*, 1/17/58.

for these cases) and high performers ("Sycamore School"). The average population in the complex by 1964 had grown to more than 1,600 boys.

The concentration of new facilities on the old Gatesville property was widely understood as reflecting the Texas Youth Council's cultivation of friends and supporters. Bob Salter, the state representative from Gatesville during the 1960s, staunchly backed TYC and, after losing his seat in 1972, became one of its consulting attorneys. The council also signed up the brother of the House appropriations committee chairman as a consulting psychiatrist, and in the late 1960s built new school facilities in Brownwood and in Giddings, each of which was situated in the district of the House speaker serving at the time it was approved. The council members' unanimity was disrupted once, in 1960, when W. C. Windsor refused to sign a cover letter stating that the council had "utilized all resources at our command" in preventing juvenile delinquency, and instead issued his own report proposing, among other things, eleven years of compulsory education (for the purpose of monitoring the activities of boys and girls up to seventeen) and keeping children in school until 5:00 p.m. Kneebone, Henna, and the council's executive director, Dr. James A. Turman, all publicly disowned Windsor's proposals. "We've made real progress here with a well-established program," Kneebone said, "and we've done that by cooperating with others. If we go out and try to stir up a controversy, I'm afraid we'll hurt the very people we're trying to help."[48] In 1961 Windsor resigned from the council.

[48] For Windsor's report see letters, Windsor to Henna, Kneebone, and Turman, 11/6/59 (copies all together), with attached "Report on Juvenile Delinquency," Box 422, Gov. Daniel Records, and also "Dallas Head of Youth Board Launches One-Man Crusade," *Dallas Times Herald,* 3/23/60. For the

Dr. Turman, who bore responsibility for TYC's program operations, played a leading political role as well, acting the part of the professional expert while Kneebone and Henna filled the role of the hardheaded businessmen trustees. A psychologist, Turman had worked for the Youth Development Council in 1950 as part of the traveling diagnostic clinic, dealing with local officials throughout the state. He moved up quickly through other positions, such as supervisor of caseworkers and director of institutions for the old council, and drafted the bill that created the new TYC.[49] As executive director, Turman constantly faced the prospect that the institutions would be overwhelmed by the tide of commitments. In addition to the building program, he appealed for a statewide parole program for juveniles that would ease the pressure on institutions by lowering the recidivism rate. When a newly released Gatesville student killed a 15-year-old boy in his front yard in West University Park on Christmas night, 1957, touching off demands for tougher sanctions, Turman responded that the incident showed the need for better parole supervision.[50] At the same time, he supported proposals to allow juvenile court judges to transfer 16-year-olds to adult criminal courts to face felony charges.[51] In some circumstances Turman was willing to play up the bad conditions inside the institutions. In 1959, testifying on TYC's requests before skeptical legislative budget officials, he called the situation at Gatesville "an emergency" and acknowledged that the school could

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reaction of the other TYC leaders and Kneebone's quoted response see Jimmy Banks, "Urgency of Needs Splits Youth Panel," *Dallas Morning News*, 3/27/60.

[49] Turman gives a thorough career autobiography in his application letter for the TYC executive directorship. Letter, James A. Turman to Frank M. Wilson (TYC chairman), 8/26/57, folder "Youth Council, Texas," Box 494, Gov. Daniel Records.

[50] "Yule Killing Blamed on Lack of Parole Officer," *Houston Chronicle*, 1/4/58, p. 1.

[51] "Move to Make 16-Year-Olds Adults in Felony Cases Is Aired in House," *Houston Chronicle*, 3/22/61.

offer "little more than custodial care."[52] Mostly, however, Turman remained intent on defending the council's programs and fending off critics.

Beyond the dangers of overcrowding and abuse, however, security at Gatesville remained TYC's most urgent problem. While the idea of dividing up the Gatesville school had always been aimed at addressing this, the council's overall plan envisioned something more ambitious. Their 1959 building appropriation included funds for a new maximum-security facility, to be built separately from the Gatesville complex. (Despite Turman's objections, however, the new facility, called Mountain View, was placed almost right next to the old complex, along the same road. Given the budget constraints prevailing at the time, the council did well to get the money approved at all.) For Turman and the board members, Mountain View was being built none too soon. The council suffered an especially intense series of embarrassments in July and August 1961, when 116 boys escaped in a single weekend following the firings of a guard and a supervisor, and then a guard was attacked and killed by a student, touching off a revolt among the guard staff. Facing a wave of critical news coverage, Turman and his superintendent insisted that the school was actually under control and that guards should not be allowed to discipline boys using unsupervised force.[53] Gatesville residents and officials again sent a wave of letters complaining to the governor and demanding an end to restrictions on guards.[54]

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[52] Ken Towery, "Fight Seen on Budget For Youths," *Austin American*, 8/30/58, pp. 1, 7.
[53] William H. Gardner, "Expert Vetoes Arming Guards at Gatesville," *Houston Post*, 8/4/61.
[54] For one example see letter, Dick Payne to Gov. Daniel, 8/1/61, and attached response, Gov. Daniel to Hon. Dick Payne, 8/2/62, in Box 193, Gov. Daniel Records.

When it finally opened in the fall of 1962, Mountain View School starkly represented the council's preoccupation with achieving control over institutional life and a respite from its critics. It was surrounded by a double chain-link fence topped with barbed wire, floodlit at night and patrolled by jeep. The school housed, on average, some 300 to 400 "chronic, serious offenders" transferred from the Gatesville complex or sent directly from the reception center. Its lengths of stays (peaking at an average of 28 months in 1967-68) were far greater than those of the other schools.[55] Austin MacCormick, making his debut as a TYC supporter in 1962, praised the council for separating out the rough kids, saying it "would afford the other units a welcome relief." Even so, he claimed, no one should fear for them:

> Mountain View should not be thought of by the public, however, as the Alcatraz of the Texas juvenile institutional system. Boys will not be sent there as outcasts but because they can be better controlled for their own good in an institution which is not wide open, and because their special needs can best be met in a special institution. The aim and purpose of Mountain View, as of the other units, will be rehabilitation, not merely punishment.[56]

MacCormick praised TYC in a series of letters issued at two-year intervals corresponding to the biennial Texas budget cycle. Beyond helping with the council's immediate funding requests, his visits and endorsements boosted the council's efforts to portray its programs as modern and up to date, no longer an embarrassment. Part of the point was to emphasize how far the institutions had come since the bad old days. Each of MacCormick's letters noted the physical transformation of the Gatesville campus, "which

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[55] See Senate Youth Affairs Committee, *Services to Youth in Texas: Preliminary Report* (Austin: n.p., 1969), p. 9.
[56] Letter, Austin MacCormick to Hon. Robert W. Kneebone, 9/1/62, p. 4, Legislative Reference Library, Texas Capitol.

20 years ago reflected no credit on the state," but had now become "a constellation of training schools of which Texas can be justifiably proud."[57] Another theme was that institutional staffing and professional services should be improved just as the buildings had been, a process which in McCormack's view was already well advanced by 1964: "The progress made by the Youth Council in the area of personnel since 1962, while not as visible to the naked eye as the preceding progress in providing physical facilities, is no less striking and significant."[58] MacCormick noted in 1967 that "the quantity of professional personnel is still obviously below the level required," and two years later he warned that the salary scale for case workers and counselors was insufficient to attract those with training and experience.[59] But the point of these warnings was that the Legislature should continue to meet TYC's rising budget requests. MacCormick was more urgently concerned with improving post-release supervision, and continuing the expansion of TYC's parole system. As soon as the council could staff parole offices throughout the state, and as soon as its Brownwood and Giddings facilities were open, he wrote in 1972, he would rank the Texas juvenile system as the nation's best.[60]

The council itself, under Turman and the board, continued to press for greater funding (especially for parole), but with MacCormick's support it shifted away from criticizing its own institutional conditions, and instead portrayed the training schools as world-class based on the care and rehabilitation they offered. The institutions, the

[57] Quote from letter, MacCormick to Kneebone, 1/13/67, p. 2, Legislative Reference Library, Texas Capitol.
[58] Letter, MacCormick to Kneebone, October 1964, excerpted in *Annual Report for 1964*, Texas Youth Council, p. 6.
[59] Letters, MacCormick to Kneebone, 1/13/67, and MacCormick to Kneebone, 1/21/69, Legislative Reference Library, Texas Capitol.
[60] Letter, MacCormick to Kneebone, 3/31/72, p. 10, Legislative Reference Library, Texas Capitol.

council claimed, "provide each youth with continuous opportunities for successful individual achievement in living situations that promote his physical, mental, emotional and moral health."[61] Reception centers—for boys at Gatesville and, after 1970, for girls at Brownwood—were able and qualified to make good placement decisions:

> Considerable professional effort, thought, energy, and money has been expended in the development of programs of diagnosis, social evaluation, orientation and classification for these reception centers. While this approach is not without its limitations, it does provide for continuing analysis and evaluation. Under the direction of a competent and interested staff, it ensures a *dynamic and individualized* program—a solid basis for meaningful and beneficial treatment.[62]

In the training schools, the "meaningful and beneficial treatment" available to each youngster largely consisted of education, social work, and medical and psychiatric treatment as necessary.[63] The council's literature sought to show that "considerable professional effort" had also gone into these programs. As Austin MacCormick had noted, after finishing building the Gatesville complex and Mountain View, the TYC did greatly increase its budgets for services to students (albeit from extremely low levels). The academic schools at each facility were fully accredited and offered transferable course credits, and with federal educational grant funds, TYC was obtaining new classroom equipment and expanding its academic and vocational course offerings. Social workers at each facility were assigned to help each student "in a one-to-one casework relationship," and to coordinate "all activities associated with the treatment of a

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[61] *Annual Report of the Texas Youth Council to the Governor for the Fiscal Year Ending August 31, 1972*, p. 28.
[62] *Annual Report*, 1972, p. 31. Italics in original.
[63] There were of course other resources provided, such as recreational activities and chaplains (since TYC was also charged with providing "religious and spiritual training"). The emphasis here is on those services having to do with treatment rather than custodianship.

delinquent child."[64] Medical care, the council claimed, was entirely sufficient: "Every facility employs the part-time services of a physician and a dentist, the consultant services of a psychiatrist, and maintains a staff of nurses." These professionals "have continuously ensured that the most modern treatment facilities and techniques are used."[65]

Some observers in the Texas press were skeptical of the council's façade of professionalism, noting the low salaries and continuing shortages of professionals and skilled personnel.[66] But the cracks in the façade came not so much from the chronically poor provision of treatment services—a problem unlikely to ignite the public—as from continued episodes of violence and accusations of brutality, especially behind the fences and walls of Mountain View.[67]

The abuse allegations led to the creation of a Texas Senate Youth Affairs Committee, which was charged with studying not only the use of force and disciplinary procedures but other aspects of the institutions, including treatment programs and services. The chairman was Criss Cole, a senator who later became a juvenile court judge. The committee recommended the closure of the old "Hilltop School." It reached mixed conclusions about the "meaningful and beneficial treatment" provided at Gatesville and Mountain View. The academic programs, it found, had come a long way, in part because of the federal funds. Casework counseling appeared less effective, with

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[64] *Annual Report*, 1972, p. 35.
[65] *Annual Report*, 1972, p. 50.
[66] Felton West and Henry Holcomb, who separately covered the TYC beat for their respective Houston dailies, both periodically undertook in-depth investigations. Holcomb finished a series of articles in 1971 which explicitly called MacCormick's assurances into question by citing other experts. See "Most fact finders stress need for changes," *Houston Post*, 8/19/71.
[67] See "The Gatesville challenge," *Texas Observer*, 2/21/69, p. 11.

high staff turnover, heavy caseloads, masses of paperwork, and limited time spent actually counseling boys. The committee was most critical of the dilapidated Gatesville hospital facility and the limited psychiatric care made available, which was provided entirely by a rotating set of part-time visiting consultants[68]

The abuse claims remained at the core of the committee's investigation. Cole's committee reviewed incident records and investigated fully a small sampling of charges. It concluded that the situation at the two boys' schools was not "one where sadistic and brutal acts are routine," but that some of the allegations of use of unauthorized force were credible, and that there was "a strong climate of suppression, repression, and fear" among both boys and staff. Guards were poorly paid, worked long hours, and frequent held second jobs. They also felt badly outnumbered, and they received poor training and unclear guidance about the practical meaning of use-of-force regulations. Boys were constantly being intimidated, and yet under the surface of their regulated routine, there was a subculture of resistance and a pecking order based on defying the rules of the institution. Some of these issues lent themselves to specific recommendations, but Cole's committee found an overall explanation in the language used by the 1949 training school code commission about the "insoluble problem" of discipline in a "mass-custody institution." To repeat this language was to assert that after twenty years, notwithstanding the new buildings, despite the bold claims, what prevailed was the same cycle of regimentation, resistance, discipline, and brutality.

As it invoked the language from 1949, Cole's committee actually shifted the underlying explanation, consciously or not. The old commission's indictment of "mass

[68] See *Services to Youth in Texas*, *supra* note 55.

custody" had implied that boys who were thrown together in the old building should be sorted out and kept separated in appropriate groups. While it may have overstated its diagnostic sophistication, the TYC actually had invested heavily in sorting and separating the boys. Twenty years later, the Cole committee never raised the issue of different types of boys being kept together. The problems of the institutions ran deeper than that, it now seemed.

In retrospect Dr. Turman, especially in his last years at TYC, seems to reflect a painful ambivalence. Like mental hospitals and other state institutions, training schools generally became controversial in a period of new social currents and conflicts. Even a figure like Austin MacCormick became less a source of credibility for the likes of TYC and more an embattled defender of traditional institutional principles that were now widely considered retrograde. Facing criticism from outside and the constant threat of disorder inside the institutions, Turman became at least occasionally paranoid, telling Kneebone and others (in a letter marked "Confidential") that one near-riot at Gatesville was "part of a concerted, nationwide anti-establishment effort to harass, to intimidate, to frustrate, and if possible, ultimately to destroy existing correctional programs and systems in the United States."[69] But with a Nixon-era backlash brewing against challenges to authority, and as always with the firm support of Kneebone and the rest of the board, Turman retained sources of political support. He rejected most of the Cole committee's recommendations, and TYC's supporters in the Legislature helped make sure the committee's proposals were never voted on.

[69] Letter, Turman to Kneebone, 10/4/71, George Beto Papers, Newton Gresham Library, Sam Houston State University, Huntsville, Texas.

Turman nevertheless seems to have remained a reformer at heart, by his own lights. At the Brownwood girls' school, which opened in 1970, a young superintendent, Ron Jackson, developed rules and practices in conscious opposition to the rigidly enforced routines at Gatesville, instead emphasizing informality, investing more in casework counseling, and recruiting volunteers from the surrounding community—all with Turman's unreserved support.[70] Seeming to let his guard down briefly, Turman told one reporter that Gatesville had been "my albatross."[71] It seems obvious in retrospect—and may have been apparent to him by then—that the effort to make the old prison for juveniles into an institution genuinely devoted to treatment was flawed at its core. Turman made an effort, working within the limits of what was possible in Texas politics at the time. (He seems to have ended up, like many others of his generation, identifying with a system he had originally felt obliged to accommodate.) He struggled for progress toward professional standards, given low budgets and the legacy of past neglect. His own legacy, however, amounts to a cautionary tale: a greatly expanded system of confinement, part still obsolete, part brand new, but either way deficient in providing treatment, preoccupied with security, tending toward brutality. It was less a process of professionalization than a struggle to simulate it, which helped to legitimate and perpetuate much of what lay behind the façade.

In the litigation that forced the reform of the Texas training schools, the jurisprudence of rights was applied, for a brief time, to serve the cause of treatment and

[70] Henry Holcomb, "Girls school has teamwork," *Houston Post*, 8/18/71.
[71] Henry Holcomb, "Gatesville complex size is a handicap," *Houston Post*, 8/17/71.

professionalization. The crucial legal concept was that of a "right to treatment." In his interim and final orders in *Morales v. Turman*, U.S. district judge William Wayne Justice found that conditions at the institutions violated the Eighth Amendment ban on "cruel and unusual punishment." But he found farther-reaching grounds for court-ordered reform in a different argument. He observed that the Fourteenth Amendment guarantee of due process required that "any non-trivial governmental abridgment of liberty must be justified in terms of some permissible governmental goal." TYC's governing statute, charging the council with providing "a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged to be delinquent," was a permissible goal, but the state was violating juveniles' right to due process if it failed to meet its goal but kept them confined anyway.[72] After presiding over a trial that revealed a host of deficiencies and abuses, Judge Justice concluded that further safeguards against abuses would fail unless the deficiencies were addressed. The "right to treatment" standard offered him sufficient authority to oversee the rebuilding of TYC from the ground up, making it genuinely a source of treatment and rehabilitation.

What actually happened then was more complicated. The trial's revelations did bring about new leadership and an abrupt shift in TYC policies. Board chairman Forrest Smith and executive director Ron Jackson, the former Brownwood superintendent, embraced the idea of reform and the principle of using the least restrictive means necessary to treat youths. But even as they relied on the fact of Judge Justice's ruling to

[72] *Morales v. Turman*, 383 F. Supp. 53 (Eastern District of Texas, 1974), Memorandum Opinion and Order (henceforth *Morales* 1974). The 1974 memorandum and order expands on the theory of the right to treatment Judge Justice first articulated in *Morales v. Turman*, 364 F. Supp. 166 (Eastern District of Texas, 1973) (henceforth *Morales* 1973).

facilitate funding and clear away obstacles to reform, they nevertheless contested the ruling itself and worked to reclaim authority from the court. The state's success in getting the *Morales* ruling reversed twice on technical grounds by the appeals court had the effect of denying the "right to treatment" as grounds for judicial oversight.

The *Turman* case eventually yielded a settlement agreement in which a panel of consultants reviewed TYC's fulfillment of various standards over a four-year period. But while it fended off Judge Justice on one front, TYC also fought battles on others, most importantly with juvenile courts over control of community corrections. The two-front war ultimately left TYC, as well as the federal court, with narrowed opportunities for reforming the ways Texas children were treated.

The Texas litigation was made possible by Supreme Court rulings that brought procedural due process to juvenile court hearings, but Judge Justice extended the reach of the federal judiciary beyond the hearing room. In *Kent v. United States* (1966) and *In re Gault* (1967), the high court registered a loss of confidence that judges were actually exercising their unchecked discretion in ways that protected children. "Under our Constitution," wrote Justice Abe Fortas in the *Gault* opinion, "the condition of being a boy does not justify a kangaroo court."[73] Fortas made a list of required protections: written notice of charges, the right to counsel, the right to cross-examine witnesses, and the privilege against self-incrimination. Texas was one state where, initially, the *Gault* ruling went unenforced. In 1971, fifteen-year-old Alicia Morales was one of dozens of children in El Paso who was detained and sent to TYC without even a hearing, following

[73] *In re Gault*, 387 U.S. 1 (1967).

an "agreed judgment" made by parents and the juvenile judge.[74] El Paso attorney Steven Bercu, with the support of the San Francisco-based Youth Law Center, tracked down Morales and several other local youths and secured a court order allowing him to investigate their cases and offer to represent them. When TYC officials at the Gainesville school refused to let Bercu interview Morales and other girls in private, he appeared before Judge Justice (who was already known for liberal rulings, and whose district included Gainesville). Along with an injunction against further interference, Bercu seized the opportunity to file a class-action suit against the state for holding juveniles illegally. Judge Justice granted the injunction and other discovery motions as the case went forward, sending a questionnaire to all inmates in the TYC system and allowing Bercu and other attorneys to interview them on site.[75]

The discovery process transformed the case. The due-process issues were settled when the state agreed in December 1972 to findings of fact conceding the plaintiffs' case, and in its next session the Legislature enacted a new Family Code that incorporated *Gault* protections. Over 500 children, including Alicia Morales, were freed from TYC on the basis of one habeas corpus writ that Bercu filed in Texas state court.[76] ut by then the plaintiffs' attorneys and the court had become preoccupied with what they were learning about the conditions of confinement. Based on their initial interviews and questionnaire responses, Bercu and Peter Sandmann of the Youth Law Center amended their pleadings, accusing TYC of brutality and neglect. Judge Justice ordered the U.S. Justice

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[74] See Bill Payne, "Hurt, frightened children," *Texas Observer*, 2/26/71, p. 9.
[75] See Frank R. Kemerer, *William Wayne Justice: A Judicial Biography* (Austin: University of Texas Press, 1991), pp. 148-153; and Kenneth Wooden, *Weeping in the Playtime of Others: America's Incarcerated Children*, 2nd ed. (Columbus: Ohio State Univ. Press, 2000), pp. 3-6.
[76] Wooden, *Weeping in the Playtime of Others*, pp. 5-6.

Department and the nonprofit Mental Health Law Project as *amici curiae* to help investigate. He also appointed a team of psychiatrists and social workers to live in the institutions as participant-observers and report to the court on their findings. By June 1973, when *Morales v. Turman* went to trial in Judge Justice's court, the court had developed extensive knowledge about what went on inside TYC's institutions.

Drawing mostly upon the testimony of the children themselves, the trial revealed customs of abuse and an environment of brutality. Guards at each school allowed violent harassment and meted out their own forms of discipline. A fourteen-year-old Gatesville inmate described "the peel," in which guards would beat a boy's bare back while the boy held his head between the guard's legs.[77] Attacks and beatings were commonplace at Mountain View and rampant in its Security Treatment Center. One routine punishment was "racking," which in Mountain View lingo meant being lined up against a wall and punched repeatedly in the stomach. One of the supervisors of correctional officers at the school, "Chop Chop" Wimberly, preferred instead to beat the boys around their eyes.[78] FBI investigators discovered dozens of cases in which boys were subdued with tear gas, at point-blank range in close quarters, causing severe chemical burns in at least one case.[79] Other punishments must have left hidden scars. At Mountain View, boys who were considered by the guards to have shown "homosexual tendencies" were sent to live in one of the two "punk" dormitories (one for Anglo boys, the other for Mexican-

[77] *Morales* 1974, p. 56. Oscar Jackson's testimony is summarized by Wooden, *Weeping in the Playtime of Others*, p. 8.
[78] *Morales* 1974, p. 70.
[79] *Morales* 1974, pp. 48-49. Wilbur Watts' experience is summarized by Wooden, *Weeping in the Playtime of Others*, pp. 14-15.

American).[80] Boys at Mountain View spent weeks at a time in solitary confinement, in the Security Treatment Center, for small infractions.[81] There they would be assigned to a work detail called "picking." Howard Ohmart, a consultant who reported to the court on his visits to the institutions, described the boys in the picking line:

> As we approached the work squad the nine coverall-clad figures (with the "security" emblem emblazoned on the back) were seated on the ground taking the carefully timed "break." Elbows on knees, head between hands, they sat staring at the ground, forbidden to either talk or look at each other. Shortly after our arrival, one of the two supervising officers gave the work signal and without a word the group arose, still in line and started swinging their heavy hoes. The hoe comes high overhead and chops into the earth, in a pointless and completely unproductive exercise. Three or four swings and the line moves forward in unison, wordless, and with faces in a fixed, blank expressionless mask. Except for the occasional furtive and fearful glance, they were like so many automatons.[82]

Judge Justice acknowledged that "brutality in the girls' institutions did not appear to be as widespread as that in the boys' at the time this court entered its emergency order."[83] But he cited several examples of physical abuse by house parents at the Crockett girls' school and assignments to solitary confinement for varying reasons and lengths at the other girls' schools.[84]

The abuse revelations lent themselves to an obvious Eighth Amendment case against TYC, but Judge Justice made them serve a broader case for reform. Ultimately

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[80] *Morales* 1974, pp. 51-52.
[81] Wooden lists some of the offenses and terms served in the STC. "Perhaps the saddest case was of the young man who was given 32 days for writing 'I love you' to a teacher at the school." Wooden, *Weeping in the Playtime of Others*, p. 12.
[82] "State Juvenile Incarceration in Texas: An Assessment," by Howard Ohmart, consultant, in folder 3-19, Box 1999/085-13, Morales Case Files, Texas Youth Commission, Archives and Information Services Division, Texas State Library and Archives Commission (henceforth Morales Case Files).
[83] *Morales* 1974, p. 57.
[84] *Morales* 1974, pp. 73-78.

he argued that the basic problem with the institutions was their lack of professionalism. He arrived at this conclusion by using the observations of investigators and expert consultants and incorporating their assumptions. One visible influence was the report of Alvin Burstein, a professor of psychology who visited the institutions as one of the expert consultants. Burstein's report shows how the visiting experts tended to interpret what they saw and heard. Leading off his summary of his experiences at the Gatesville, Mountain View, and Gainesville schools, Burstein noted that they had not been built, and in a sense had never functioned, as actual schools:

> First, there is the overwhelming impression of rigidity, sterility, and anonymity of the institutional life which is imposed upon these children. The dehumanizing routine, a clear heritage of the penal ancestry of these units, is psychologically pathogenic, particularly in the case of children whose psychological maturation depends upon their capacity to form their personal identities on the basis of close, individual human interaction. At best in these units, children are treated by the numbers and for administrative convenience, not as growing psychological organisms.[85]

The penal heritage of the institutions, Burstein argued, was perpetuated by the power relations among the institutional staff:

> Second, there is a clear split between the clinically and treatment-oriented professional staff (largely caseworkers) and the attendant staff. The treatment and educational activities are obviously grafted artificially onto a dominant base of basically punitive and restrictive policing structures.[86]

[85] Draft report by Alvin Burstein (unsigned), in folder 7-38, Box 1999/085-28, Morales Case Files.
[86] Draft report by Burstein, *supra* note 85.

The relative powerlessness of teachers and other care providers was one problem. Another (albeit related) problem, in Burstein's view, was that the care providers were incompetent:

> Third, the professional preparation of the case workers, psychologists and social workers is abysmal. Though many of them boast degrees, their actual knowledge and skills is [*sic*] at a very, very primitive level. Despite the fact that they are working with a high-risk population, they bring extremely limited skills to bear.[87]

Burstein's specific criticisms of the activities of the professional staff reflected his overall view of their abilities. Psychiatric treatment was "heavily psychopharmacologic and would appear more grossly attuned to a psychotic population, with its heavy reliance on tranquilizing agents." There was no group therapy, the diagnostic tests used to assess individual youths were barely understood, and the time served by youths was "largely contingent on the number of their previous offenses and on their readiness to accept the discipline of the institution, rather than their needs."[88]

Howard Ohmart was less sweepingly dismissive of the professionals employed by TYC than Burstein, but he identified the same basic institutional failing—the dominance of guards over other staff. Ohmart's report to the court, unlike Burstein's, was almost entirely analytical rather than anecdotal—with the exception of his recounting of his own horrified response to the Mountain View Security Treatment Center and the picking line. Ohmart actually offered qualified praise for the educational resources at Gatesville and Mountain View, noting the improvements made with federal grant aid. Also, casework counseling showed signs of improvement at Mountain View, with lower caseloads than at

[87] Draft report by Burstein, *supra* note 85.
[88] Draft report by Burstein, *supra* note 85.

Gatesville and a pilot program in group counseling under way. But, Ohmert argued, overall Mountain View served to show "how the effect of some rather good program elements . . . can largely be nullified because of the punitive, regimented, and oppressive posture that characterizes the custodial staff operation." The effect of this "posture" on life at the institution was not limited to the picking line:

> The generally rigid and regimented tone of Mountain View is expressed in other ways: in the tight group movement of youths as they go from dorm to classroom or dining hall; in the absence of talk as they wait in line to be fed; in the requirement that they take off their shoes as they enter upon the shiny, polished floor of the dayroom in the dorm; in the neatly and tightly made beds, precisely aligned in the dormitories, which the boys are restricted from entering until shower and bed-time; in the fact that all personal belongings are locked away in a separate room and are made available only upon request to the CO [corrections officer] and clothing room boy; in the loud, harsh, and authoritarian way in which the Assistant Superintendent barked questions about the youths appearing before the Discipline Committee.

Ohmert concluded that Mountain View was "an evil, oppressive and authoritarian operation," not by default but by design. The reign of terror by uncontrolled, unconstrained guards was part of the original scheme and had only been reinforced over the years. Consequently the school was "physically superior to anything in the Gatesville complex" and had more teachers and social workers per capita, but was nonetheless "easily the darkest blot on a generally inadequate institutional system."[89]

Citing testimony on some of the most outrageous conditions, the plaintiffs and the *amici curiae* together moved for emergency interim relief. On August 31, 1973, only a few days after the end of the trial, Judge Justice issued a preliminary order granting the

[89] Draft report by Ohmert, *supra* note 82.

requested relief.[90] Like the plaintiffs' motion, Justice's preliminary order cited a selected set of conditions, consisting mainly of brutality, abuse, and neglect at Mountain View, but also including solitary confinement and "security facilities" for disciplinary cases at the other schools, as well as interception of mail, restrictions on speaking Spanish, restrictions on visitation policies, and the absence of screening for prospective TYC employees. What these conditions had in common was not just the urgency of the case for immediate relief but also the strength of the legal case for their unconstitutionality. The most shocking of them were all covered by the Eighth Amendment case against TYC, which was narrower than the "right to treatment" case but established beyond doubt by the trial record and obviously less vulnerable to appeal. The order did also assert the "right to treatment" doctrine in a way that suggests that it applied broadly to the case: "The commitment of juveniles to institutions under conditions and procedures much less rigorous than those required for the conviction and imprisonment of an adult offender gives rise to certain limitations upon the conditions under which the state may confine the juveniles."[91] But Justice invoked this right directly only against a few conditions, such as the failure to screen employees, segregation "by untrained correctional officers" of suspected homosexual boys, family visitation restrictions, and the failure to provide students with an ombudsman. He was willing to use the right to treatment where necessary to provide the immediate relief he deemed essential, but mostly reserved the principle for his final ruling. (He struck down the restrictions on mail and Spanish-speaking on First Amendment grounds.)

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[90] *Morales* 1973.
[91] *Morales* 1973, p. 176.

As it stood, the interim order amounted to a sweeping attack on the customs of Mountain View, Gatesville, and the other schools. In place of traditional unwritten rules, it imposed the kind of meticulous regulations that TYC had never composed for itself: "The use of physical force of any kind by any TYC personnel on any TYC inmates shall not be permitted except to the extent reasonably necessary (i) in self-defense, (ii) in defense of third persons, whether TYC inmates or TYC personnel or others, (iii) in effecting restraint on TYC inmates in the act of escaping, or (iv) to prevent substantial destruction of property. . . ."[92] Inmates were to be allowed to file reports with their caseworkers alleging any unjustified use of force against them, and superintendents were required to investigate and report findings within ten days. In the same spirit, Justice placed restrictions on solitary and other disciplinary confinement, required open deliberations and written findings for all assignments to Mountain View, and assigned the chief caseworker at Mountain View to serve as an ombudsman. Family visits "shall be permitted (1) for at least two hours a day on at least two separate days between Monday and Friday, inclusive, except holidays; (2) on Saturdays, Sundays, and holidays between 9:00 a.m. and 5:00 p.m."[93] The final instruction was that three copies of the order itself were to be posted in every dormitory facility at all the TYC schools, "in a conspicuous place, preferably a bulletin board near the entrance of the building."[94]

Unanticipated consequences of court rulings are an endlessly recurring theme among histories of litigated penal reform. In the case of the interim *Morales* ruling, for once, the political effects were favorable: instead of spurring resistance, as in so many

[92] *Morales* 1973, p. 177.
[93] *Morales* 1973, p. 180.
[94] *Morales* 1973, p. 182.

other instances, the ruling led to the final collapse of TYC's old regime. Turman, who gave a deposition but was never called to the stand to defend TYC, was demoralized by the trial testimony, and the interim ruling seems to have served as the last straw.[95] Two weeks after the ruling, rioting students at Mountain View destroyed much of the industrial shop equipment, and over a hundred inmates broke out of the Gatesville complex. Some observers saw the disorder as reflecting the frustrations of the staff at the schools, who were reported to have allowed the rampages to continue unchecked. Turman blamed the riots on Judge Justice and claimed that the ruling's legalisms had created confusion among the custodial staff about the actions they could take. (Curiously, he also maintained that the same court order had clearly incited the students to riot.) But in the wake of the trial, TYC's own credibility was too badly damaged for Turman to be able to turn the issue against the federal court. Governor Dolph Briscoe told reporters that guards had failed to act because TYC had misinterpreted the ruling. Several days later, at the next TYC board meeting, longtime chairman Robert Kneebone was deposed as chair by his two fellow board members, and immediately resigned from the board. Moments later, at the same meeting, James Turman offered his own resignation. Whatever he may have felt about the trial revelations, he defended his employees to the bitter end. "These people have to have support," Turman said. "When it comes to the point where they are maligned and abused and their integrity questioned by a member of the governing board, then it's time for me to quit."[96]

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[95] Ron Jackson told Frank Kemerer about the trial's impact on Turman: "It just kept beating him down. He felt like people had really let him down." See *William Wayne Justice: A Judicial Biography*, pp. 159-160.
[96] "2 TYC Officials Resign," *Dallas Morning News*, 9/22/73.

For TYC, the ousting of Kneebone and Turman marked a dramatic and genuine shift. Both of the remaining board members accepted the idea that Texas juvenile justice needed reform. Pat Ayres, a San Antonio business owner's wife and civic board member, had just been appointed by Governor Briscoe. Forrest Smith, a Mobil Oil executive, who took over as chair after seconding his own nomination (Ayres having made the motion), had served for four years on the board and had shifted from outspoken support to troubled skepticism about TYC operations. After the trial confirmed his worst fears, Smith became an even more emphatic advocate for progressive reform of juvenile justice. In part his aggressiveness reflected a conviction, at least initially, that he was carrying out a mission personally entrusted to him by the governor. Briscoe was a notoriously reclusive and enigmatic character whose intentions were frequently obscure, but, in late 1974, as Smith spoke in defense of a proposed master plan written by private consultants, he recalled being given some very straightforward instructions:

> The idea of this report was born in Governor Briscoe's office, one week after the riot in Gatesville in September, 1973, when the Governor, [two aides], and I were talking about the problems of the Texas Youth Council, the court order, and what ought to be done for youth in the State of Texas. He said he wanted a plan developed for the future of the state that will give Texas the best youth services delivery system in the United States. He said, "I want to do whatever is necessary to do it, spend whatever money is necessary to get the best report available, and the best plan available. I want input from all concerns." That is the plan we were operating under.[97]

[97] Minutes of the Texas Juvenile Corrections Master Plan Advisory Meeting, Dec. 4-5, 1974, p. 10, in folder "Advisory Council minutes, 1974," Box 2003/030, Records, Texas Youth Commission. Archives and Information Services Division, Texas State Library and Archives Commission (henceforth TYC Records).

After Turman resigned, Smith and Ayres quickly appointed Ron Jackson as acting executive director. Still only thirty-three years old, Jackson was unique among TYC's senior staff in the depth of his experience—as an orphan, he was himself a product of state institutional care, and had started out at TYC as a janitor while earning his social work degree—together with his lack of rigid loyalty to customs and traditional attitudes among the staff. Instinctively sympathetic to the youngsters themselves, rather than their jailers, he took over the Brownwood school for girls in 1970 and was the one institutional superintendent who took advantage of Turman's loose supervision to try to chart a progressive course for his school. Immediately upon being elevated, Jackson ordered dozens of changes in TYC policies and procedures, including in areas such as staff training, use of force, mail, bilingualism, and visitation which Justice had cited.[98]

Belatedly but abruptly, TYC had come under reform-minded leadership. But while the sudden transition was obviously a consequence of the court case, the relationship of the agency leaders to Judge Justice would remain complicated and largely antagonistic, as long as the *Morales* case continued. Perceived needs of legal defense as well as reformist convictions would continue to drive policy. In early 1974, as Justice prepared his final opinion, state attorneys moved to reopen the case on the grounds that TYC had already changed the circumstances at issue, which in part explains the urgency with which Smith and Jackson were acting. As their efforts would show, their

[98] See memo titled "Texas Youth Council Programs of Service, Beginning September 1, 1973," in folder titled "Innovative Ideas for Change," Box 1999/085-66, Morales Case Files. This document lists 47 action items, including "redefinition of policies of use of force" and, even more broadly, "restatement of TYC goals as the student centered programs and the focus is to be on the individual student" [*sic*]. The copy of the memo contains handwritten markings appearing to indicate Jackson's assignment of particular action items to individual aides.

commitment to reform was genuine, but even they could not or would not concede the legitimacy of federal court oversight.

Judge Justice widened the gap further with his memorandum opinion and order, published on August 30, 1974. While much of the opinion was devoted to analysis and documentation of the same conditions cited in the interim order, the fundamental difference involved its use of the right to treatment. Instead of citing it sparingly, Judge Justice now seemed to be testing its farthest reaches as a means of forcing fundamental changes in youth confinement. In part the contrast between the interim and final rulings seems to reflect a judgment that the legal foundations of the right to treatment were still under construction and had only just been reinforced. In its ruling (issued April 26, 1974) in *Donaldson v. O'Connor*, a case arising from an involuntary confinement in a Florida mental hospital, the Fifth Circuit argued from its own newly constructed synthesis of the case law supporting the right to treatment.[99] Justice cited at length the new ruling's two-part formulation of a due-process test: the government must justify any abridgment of liberty in terms of a legitimate public goal, and it also "must afford a *quid pro quo*," such as rehabilitative treatment, "to warrant the confinement of citizens in circumstances in which the conventional limitations of the criminal process are inapplicable."[100] Armed with this far-reaching principle, Justice gave actual legal force to the expert witnesses' assessments of TYC conditions and practices. Using these evaluations, he cited constitutional deficiencies in initial assessment procedures, the academic and vocational education programs, the "milieu" of daily institutional life,

[99] *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), vacated and remanded June 26, 1975.
[100] *Morales* 1974, p. 72.

medical and psychiatric care, and the care provided by caseworkers. In all these areas, Justice ruled, TYC wards were constitutionally entitled to procedures and the level of care prescribed by professional authorities.

The right to treatment thus required the maintenance of many sets of "minimal professional standards," which Judge Justice proceeded to formulate in varying degrees of detail. Several key examples serve to demonstrate the extent of the judge's assertion of authority and the extent—and the limits—of his vision of a professionally validated system of youth confinement. In the area of assessment and placement of incoming wards, the judge found that the work of TYC's classification committee was cursory and—since the range of placement options was so narrow—virtually meaningless anyway. In this area Judge Justice himself specified the minimally acceptable professional—therefore constitutional—procedures. Every incoming child "must have the benefit of an individual assessment, to serve as the basis for his treatment plan. The plan should include, *inter alia*, a family history, a developmental history, a physical examination, psychological testing, a psychiatric interview, community evaluation, and a language and educational analysis evaluation." The judge specified minimum professional credentials for social workers and psychologists conducting the assessment, and ruled that "the Weschler individualized intelligence quotient test, rather than the group Lorge-Thorndike IQ test, must be utilized."[101]

In most areas, however, Judge Justice defined the minimally acceptable elements more broadly and left it to the plaintiffs and TYC to work out the implementation of new procedures. In setting standards for the almost unmanageably broad realm of daily

[101] *Morales* 1974, pp. 85-89.

institutional life, the judge actually felt compelled to define the "minimal elements" of the treatment to which juvenile delinquents had the right. They reflected both a view of adolescent development typical of the period and an uncompromising view of the state's obligations to its wards:

> A treatment program must aid the youth in achieving "the tasks of adolescence" that precede his emergence as an independent adult. These tasks include establishing sexual identity, developing intellectual and occupational skills, achieving independence from parental authority, developing a capacity for genuinely intimate relationships, and, finally, evolving a moral code to govern future actions. Treatment of an adolescent who has tangled with the law or had difficulties with his family or school authorities must ensure that the juvenile receives the ingredients that a normal adolescent needs to grow and develop a healthy mind and body. Because of his often deprived background, the delinquent needs a more concentrated dose of these normal factors, together with such intensive or particularized help as special education, therapy, or physical rehabilitation that he may need. Unless normal needs are met, no special therapy modality will work, and the treatment program cannot be deemed an adequate one.
>
> The essential ingredients of normality for a youth are a sense of self-respect, warm and understanding adults, a chance to participate in decisions that affect him, adequate diet and recreation, opportunity for adventure and challenge, and legitimate outlets for tension, anger, and anxiety. In addition, the environment must promote the juvenile's feeling of security from fear of physical and psychological abuse, and provide well-defined limits within which the juvenile knows his behavior is acceptable. The juvenile must also understand what is expected from him and what is hoped for him.[102]

If Justice seemed to display a tendency to define idealized circumstances as "minimal elements," the explanation seems to lie in his continuing reliance on the judgments of expert professionals, who may have felt ethically constrained from drawing a distinction between what they aspired to provide and what might be "minimally acceptable" under some other standard. In any case, Justice's high benchmark for institutional milieu

[102] *Morales* 1974, p. 93.

served to highlight the deficiencies of the monotonous, regimented, yet insecure life made possible at Gatesville and Mountain View. It also supported the judge's emphasis on the need for integrated efforts on the part of caseworkers and other staff. It did not, however, lend itself to a comprehensive set of rules precisely crafted by the court. The particular constitutional rights relating to the daily milieu, as Justice defined them, remained fairly broad. They included "adequate case work services" by trained social workers, "a physical plant designed to maximize the child's security, privacy, and dignity," freedom from "unnecessary confinement" and from "unnecessary or arbitrary invasions of privacy," and "an environment that permits the juvenile to express—either verbally or non-verbally—the emotions, such as anger, affection, or unhappiness, that he may feel, unless the expression is harmful or disruptive."[103] These rights reflected Justice's standard of adequate treatment but also that of the least restrictive alternative among available treatment options, which rested on a separate legal basis.[104] The judge directed the plaintiffs and TYC to work out a plan to secure these rights.

The adequacy of casework and other child care services was itself one more issue that required attention at length in the ruling, and in dealing with it Judge Justice revealed the scope of the change he envisioned. The judge made some prescriptions that were predictable responses to the conditions described by Burstein and Ohmart: social workers, house parents, and all other child care staff should have adequate professional credentials, expertise, and training; family involvement in therapy should be promoted rather than discouraged; and case workers and other types of staffers should coordinate

[103] *Morales* 1974, pp. 100-101.
[104] See *Morales* 1974, p. 125, for a discussion of the right to the least restrictive alternative as it relates to the requirement to provide treatment in non-institutional settings.

their efforts rather than working independently or at cross purposes. More significant in its intended implications was Justice's view of minimally adequate staff numbers and caseloads. Child care workers, he stated, "must be employed in numbers that are consistent with *individual* attention to every juvenile," and caseworkers "must be employed in numbers adequate to provide personalized care to every juvenile, as well as to furnish competent supervision for all staff members who have contact with juveniles." The hardest cases would receive even greater professional attention:

> Each juvenile has the right to the implementation of a cohesive treatment strategy that has been professionally designed to suit his individual needs and achieve his rehabilitation and return to the community. In this connection, it is essential that those juveniles who are most emotionally disturbed or who manifest the most pronounced anti-social attitudes and behavior be the recipients of intensive treatment. For this purpose, the ratio of psychiatrists, psychologists, caseworkers, and attendant personnel to the juveniles to be accorded intensive treatment must be greatly enhanced.[105]

Again Judge Justice directed the parties to negotiate a plan for the provision of services that met his stated standards. But by this point the recurring instruction, and the ostensible presumption that a drastic increase in the intensiveness of treatment could be one more matter to be worked out between the parties, seems hard for a reader to take fully seriously. Judge Justice was not nudging TYC to make adjustments. He was trying to force it to transform itself completely.

In his discussion of the extent of necessary treatment for individual youngsters, Justice revealingly cited the trial testimony of Jerome Miller. Miller was one of the most potentially controversial choices of expert witnesses by the plaintiffs in the trial phase.

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[105] *Morales* 1974, p. 121.

By then the former head of the Massachusetts Department of Youth Services, he had touched off bitter controversy by shutting down the state training schools and moving almost all the young offenders into small non-secure residential programs within communities.[106] Judge Justice actually had invited Miller personally to come to Texas and had toured the Mountain View school (and the TYC school for girls at Crockett) along with him prior to the trial.[107] In his long memorandum order and opinion Justice used Miller's testimony only a few times, but still managed to imply that deinstitutionalization in some measure would be an inevitable part of any effort to implement his order. He cited Miller's own account of what he had accomplished in Massachusetts to show that meeting his standards for individualized care was perfectly feasible:

> In the process, the directors of the [Massachusetts] agency discovered that far fewer children than expected actually required institutional care. Since the transfer of the vast majority of institutionalized juveniles to less confining programs freed large amounts of funds, those few juveniles who remain in intensive care institutions have been "surrounded" by staff. In fact, Dr. Miller estimated that the staff-inmate ratio at the institutions that remain in Massachusetts is one to one *or higher*.[108]

In his next to last section, as if staging the climax of a long drama, Judge Justice turned his focus to the Gatesville and Mountain View schools themselves, whose failings had by now been so thoroughly exposed. Citing observations by both Miller (who had struggled

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[106] See Rob Wilson, "The Legacy of Jerome Miller," *Corrections Magazine*, Sept. 1978, pp. 12-17, for a brief overview of Miller's tenure. The Massachusetts General Court Joint Committee on Post Audit and Oversight issued a harsh condemnation of Miller's management of deinstitutionalization, reflecting the general controversy in the state. See "Management Audit of the Department of Youth Services," April 1974. Miller's own version of events and response to his critics is contained in *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* (Columbus: Ohio State Univ. Press, 1991).
[107] See Kemerer, *William Wayne Justice*, pp. 156-158.
[108] *Morales* 1974, p. 120.

to reform Massachusetts institutions before closing them) and Ohmart on the impossibility of uprooting institutional culture, Justice found that the two schools were "places where the delivery of effective rehabilitative treatment is impossible, and that they must not be utilized any longer than is absolutely necessary as facilities for delinquent juveniles."[109] The facilities themselves were both inherently cruel and unalterably inimical to effective treatment. "No reforms or alterations can rescue these institutions from their historical excesses."[110] Trying to craft a nuanced position, Justice denied that "the institutionalization of a juvenile is unconstitutional *per se*," but argued that large, rural institutions serving masses of students and located beyond the reach of accessible professional services were bound to fail to meet the constitutional standards he had set forth at such length. In the end he made clear that he expected nothing less than for Texas to follow the path Massachusetts had traveled:

> In summary, Gatesville and Mountain View must be abandoned as quickly as possible. The court will consider the consensus of parties as to how soon this may be accomplished. Within a reasonable period . . . the defendants must cease to institutionalize any juveniles except those who are found by a responsible professional assessment to be unsuited for any less restrictive, alternative form of rehabilitative treatment. Additionally, the defendants must within the same period create or discover a system of community-based treatment alternatives adequate to serve the needs of those juveniles for whom the institution is not appropriate. Those juveniles for whom close institutional confinement is necessary must *actually* be treated. . . . In particular, those *few* juveniles for whom close confinement is appropriate must be surrounded by a staff trained to meet their special needs, in a virtually one-to-one ratio.[111]

[109] *Morales* 1974, p. 122.
[110] *Morales* 1974, p. 123.
[111] *Morales* 1974, pp. 126-127.

Even for advocates of reform within TYC, forced deinstitutionalization by federal court order was no gift—or at least not one that they could acknowledge. Both Smith and Jackson denounced the opinion, albeit for significantly different reasons. Smith voiced the kind of opposition to judicial micromanagement that might be expected from whoever occupied his position as board chairman. "It is the TYC's responsibility to set the policy of the agency and not the court's," Smith said. "We have a much better chance of achieving our goals and obtaining mandatory support of communities and the legislature if plans are those of the agency, and not those mandated by the court."[112] He made it clear that his disagreement with Judge Justice was not over the desirability of particular reforms but simply over the authority and oversight of the court.[113] Jackson, however, was publicly critical of the substance of the ruling. In a statement to the press he accused Justice of refusing to take TYC's newly launched reforms into account and cited attacks on Jerome Miller's record in Massachusetts. He later made clear that he viewed the demands of plaintiffs and the court itself as unrealistic.[114] More importantly, having only recently been focused on creating a progressive institution, he was unpersuaded of the urgency of full deinstitutionalization. "I am not in favor of closing any institution at this point," he stated. "We have determined that although they should not be the sole form of

[112] Smith quoted by Nadeane Walker, "TYC can meet its goals on its own, Smith says," *Dallas Times Herald*, 9/12/74. Also see citations in Michael J. Churgin, "Mandated Change in Texas: The Federal District Court and the Legislature," in Joel F. Handler and Julie Zatz, eds., *Neither Angels Nor Thieves: Studies in the Deinstitutionalization of Status Offenders* (Washington: National Academy Press, 1982), pp. 885-886.

[113] Smith later told Kemerer that Justice's ruling "coincided with what I felt ought to be done." See *William Wayne Justice*, p. 170.

[114] Describing his meetings with the plaintiffs' counsel as directed in the court order, and recalling the plaintiffs' opening proposal, Jackson told Kemerer, "It was really a wild plan, calling for the immediate closure of Gatesville and Mountain view, the scaling down of other institutions, the placement of kids in foster care programs that were not in existence across the state—proposals that we didn't feel comfortable with." See *William Wayne Justice*, p. 168. In fact, the parts of this "wild plan" were basically what Smith himself was trying to facilitate.

treatment for the juvenile offender, institutions are a necessary form of treatment for many."[115] After meeting with TYC officials, the Texas attorney general's office announced it was appealing the ruling. Resistance to direction by the federal court would continue to drive the council's policy.

The decision by Smith in particular to support the state's appeal, and keep fending off Judge Justice, may have been all but automatic at the time, but in retrospect it appears fateful. Smith later recalled that he "used the court order as an impetus for change in the juvenile justice system statewide."[116] He nevertheless fought the court's assertion of authority over his own domain, and his opposition also seems likely to have been a means of maintaining his own bona fides in a state political climate which was always generally hostile to federal intervention. Overall, Smith's apparent strategy—taking advantage of federal court pressure to push for reform while using the same court as a political foil—seems flawed in its basic conception, even if it accounted for political realities that escaped Judge Justice's notice. Jackson's approach seems less conflicted, but only because he lacked a commitment to the radical transformation envisioned by Justice and Smith.

The basic problem for juvenile justice reformers in Texas, and for the aspirations they generally shared, was that they could not find ways to work together, or at least to support each other's efforts. The necessity of doing so, for their own purposes, seems to have gone unrecognized, perhaps in part because deinstitutionalization appeared to be occurring on its own, driven by factors beyond TYC's own control. The average daily

[115] Jackson quoted in Mark Villanueva, "Youth Council To Appeal Ruling," *Daily Texan*, Sept. 6, 1974.
[116] Kemerer, *William Wayne Justice*, p. 170.

population of TYC training schools, which had remained slightly over 2,000 for over a decade, dropped by half, to a total of 994, from 1973 to 1974. Suddenly the Gatesville complex, which had long housed the majority of inmates in the system, contained no more than some six hundred youths. As for Mountain View, TYC staff had virtually ceased making commitments to the facility, whose daily average over the two years went from 311 to 70 inmates.[117] For the system, the leading factor in the sudden decline was the newly mandated exclusion of "status offenders" (whose minor offenses, such as truancy, running away, or underage drinking, followed from their status as juveniles), as the revised Family Code enacted in 1973 came into force. At the same time, years of bad publicity about TYC, climaxing in the *Morales* trial and rulings, had evidently come to outweigh the normal inclination of local juvenile judges to expel problem youths from local communities. But neither of these factors would persist for long, or offer more than a respite from population pressures.[118]

Smith's own campaign for juvenile justice reform was ambitious and appears to have been carefully conceived, but it ultimately proved quixotic. Asserting responsibility not simply for the training schools but for bringing about the shift from institutional confinement to community-based care, he aggressively sought to initiate the process under TYC's management. He and Pat Ayres together maintained a majority of the three-member TYC board (which was expanded to six members in 1975), although they were opposed by Don Workman, another recent Briscoe appointee to the board and a

[117] Average daily population figures listed in Texas Youth Council Annual Report for 1974, p. 67.
[118] In the 1975 session of the Legislature, the new code was amended to allow once again for the confinement of status offenders, or CHINs (children in need of supervision) under certain restrictions, which were loosened further in 1977. See Churgin, "Mandated Change in Texas," pp. 880-881.

highly conservative West Texas banker. Over Workman's staunch objections, Smith and Ayres passed a formal budget request to the upcoming 1975 Legislature that contained, on top of existing operations, $30 million in new funds for TYC to grant to community programs.[119] The request for funds was obviously ambitious, but Smith had done some work to prepare the way for it. As his self-described conversation with Governor Briscoe indicates, he had used the governor's endorsement early on to try to obtain a planning document that would guide reform efforts and give them legitimacy and prestige. After this conversation, the details of which Smith was presumably willing to share generously, he was able to obtain planning funds from the governor's office and hired outside consultants to draft a new master plan for statewide juvenile corrections. In addition to showing TYC how it could manage the reassignment of responsibilities for juvenile services to local agencies, the master planning process was intended to mobilize support for the task and the appropriations that it would require. Before being formally presented to TYC the master plan itself was to be considered and endorsed by a blue-ribbon advisory council.

Insofar as it was designed to yield solid support for Smith's budget request, the master planning process ended up running off its rails, which suggests the difficulty of the political maneuvering that Smith was attempting to manage. At first the process seems to have gone as he intended. An initial draft of the master plan was reviewed by the advisory committee in September 1974. According to one report, this version of the plan would, "as Justice ordered, phase down TYC's institutional program and initiate a wide variety of community-based services. TYC would become a provider of services

[119] Minutes, TYC board meeting, 12/4/74, Box 1998/213-1, TYC Records.

rather than a builder of institutions, a concept favored by Chairman Forrest Smith."[120] In fact, the consultants envisioned TYC as both direct provider and grant-maker for community services. Instead of closing down the training schools entirely, TYC would continue to operate them as facilities serving new specialized-care functions, and it would also maintain a corps of "youth development agents" working directly with troubled teens to preempt delinquency. But "perhaps the major innovation" would be the grant program, with which TYC would enable counties to develop their own residential and non-residential programs for young offenders.[121]

For all his determination to maintain TYC's leadership of the march toward community-based corrections, Smith appears to have remained sensitive to the need to empower local officials and providers to take the initiative in developing community programs for themselves, both for the sake of the programs themselves and for purposes of maintaining their support for deinstitutionalization. He, as much as anyone, seems to have been blindsided by the final draft of the master plan, as submitted to the advisory council and debated in early December. The consultants appear to have been advised by Smith and other council members to emphasize local responsibilities for organizing youth services, but their final plan left the redesigned TYC, with its "youth development agents," with much of the task of working with youngsters and providing skills training.[122] Robert Carkhuff, the lead consultant, took a dim view of "communities that have not been delivering services" and said that turning over responsibilities to them

[120] Sara Lee Tiede, "TYC urges shift from confinement to rehabilitation," *Dallas Times Herald*, 9/29/74.
[121] Tiede, "TYC urges shift." Also see Mike Ullmann and Vicki Vaughn, "Youth Council Views Delinquent Care Plan," *Daily Texan*, 9/30/74.
[122] See State of Texas Juvenile Corrections Master Plan, prepared by Carkhuff Associates, 11/25/74.

"would be giving them more of what they are not now doing." He told the advisory committee that his firm had been "trying to design an effective program, not just a practical, politically viable program."[123] It proved not to be a very practical or politically viable message to offer to the advisory council, whose members, one by one, all spoke against and vented no small amount of frustration. Smith, sitting in on the meeting along with many others, voiced his own misgivings about Carkhuff's approach and tried to reassure the advisory council that TYC would endorse no plan that did not meet with their consensus approval. He urged the council to pass a motion endorsing the amendment of the master plan so that state funds would be used for grants to local and regional authorities rather than direct care programs. (Workman, who opposed deinstitutionalization, then complained that Smith was trying to "coerce" the advisory committee.) Smith's motion passed, and was duly sent back to him in the advisory committee's report to TYC, but the impact was clearly not what he had hoped for. Press coverage of the advisory council meeting were devoted almost entirely to the council members' complaints about Carkhuff's plan.[124]

Even with a more ringing endorsement by an advisory council of influential supporters, Smith's ambitious program would have faced a lengthy gauntlet in the Legislature. As it turned out, it went down to a quick defeat before the Legislative Budget Board, the first high hurdle in the biennial appropriations process. The LBB's recommended budget for TYC did not zero out the figure for community services, but cut

[123] Minutes of the Texas Juvenile Corrections Master Plan Advisory Meeting, Dec. 4-5, 1974, p. 33, in folder "Advisory Council minutes, 1974," Box 2003/030, TYC Records.
[124] See Sara Lee Tiede, "Youth Council master plan attacked by entire citizens advisory group," *Dallas Times Herald*, 12/5/74.

it from $30 million to $9 million. Perhaps even more woundingly, the Executive Budget Board, which prepared the governor's own proposals, put the figure at just $3 million, signaling all too clearly the extent of Briscoe's continued support for Smith's work. At the TYC board meeting in Feburary 1975, Smith bitterly acknowledged the political implications:

> This recommendation was a victory to those who have opposed the Texas Youth Council moving into new areas of interest. Because of criticism alluding to not building support and good programs properly and spending too much too soon, these recommendations have been made. . . . This should be considered defeat. I am saddened and disturbed because of this. It looks as if they were totally ignorant of the fact that TYC is up against the gun in the Court; clearly the Federal Court is moving us toward community-based programs. . . . The Governor's staff turned us down because they don't have confidence that we could do this and spend money wisely. That seems that this agency [*sic*] can't be managed as far as they are concerned. TYC cannot reach where it needs to go with this budget, possibly with the LBB, but I doubt it. The minimum would be around $15,000,000 or $16,000,000 in community based efforts to make the kind of impact the State of Texas needs.[125]

Smith had trouble accepting the outcome, even as he recognized it. How could it only amount to this, when the theme of moving from institutions to community-based care had gained such broad acceptance? Everyone knew about the Court ruling, which was being appealed but still hung over TYC's head. Smith had made his own policy intentions, and those of his board majority, clear all along. "The editorials are ten to one in favor of the new direction of TYC. The Advisory Council is in favor of the new direction. . . . Who is not getting the word? Where have we failed to communicate?" Perhaps they could still prevail, notwithstanding the budget board recommendations: "Our next course of action is to do what we can to tell our story to the Legislature. Ron, that is your job. You

[125] Minutes, TYC board meeting, 2/5/75, p. 18, Box 1998/213-2, TYC Records.

are there daily. I will consider this to be a failure if this is all we get."[126] But Jackson had no intention of being made into a scapegoat. Neither he nor his staff, he insisted, were creating the problem. "We are going to work as hard as we can to sell this program. I hope that there is not any doubt about this." But, he argued, $9 million was still a substantial sum, on top of other appropriations for parole services and the TYC central office. "I feel that this is good support. I hope it is not considered a failure on our part if TYC doesn't receive its request."[127] Ultimately, due to the work of Jackson and his staff and with the help of legislators sympathetic to the idea of reform, TYC was able to salvage a $9 million appropriation for community services.

The final passage of the line item was an important but mixed outcome. The Legislature did not reject the whole idea of continued reform, but it would not give a single state agency the money and power to force a transformation of youth corrections. Instead, it would give TYC a small amount of money to use to promote reform gradually. Smith himself, together with the more ambitious goals with which he had identified himself, was most clearly the victim, and the outcome fully exposed his lack of higher connections and influence. "When I lost the support of the governor, I also lost the support of Ron Jackson," he later recalled. "I became chairman in name only."[128] With his six-year term expiring in 1975, Smith waged an unsuccessful battle to persuade Briscoe to reappoint him to the board. Instead, the governor picked W. M. Shamburger, the conservative pastor of the First Baptist Church in Tyler, a prominent critic of Smith's

[126] Minutes, TYC board meeting, 2/5/75, p. 20.
[127] Minutes, TYC board meeting, 2/5/75, p. 35.
[128] Kemerer, *William Wayne Justice*, p. 170.

efforts.[129] The immediate impact of this appointment was actually very modest because even a more conservative board had little power to turn back the clock, as long as it remained likely to have to comply with Judge Justice's orders. But after the departure of the strongest advocate of deinstitutionalization ever to lead the TYC board, the possibilities for reform remained permanently narrowed.

In the aftermath of the *Morales* trial and Judge Justice's rulings, at the point of broadest general acceptance of the prospect of deinstitutionalization, the basic conflict between institutional administrators (or at least those committed to providing care and treatment) and local juvenile judges was temporarily obscured. As long as judges were unwilling (or, for some offenders in newly restricted categories, unable) to condemn youths to the horrors of Gatesville, or as long as they at least shared the perception that shifting placements to programs within the community represented social progress, then they could be expected to accept—and perhaps support—plans such as Smith's which would offer access to new program funds. TYC's role as the source of state funds seems not to have posed a necessary problem as long as the judges and the TYC board shared the same broad priorities, and as long as TYC's role involved approving grant-in-aid proposals by local authorities and providers (as Smith himself had intended) rather than providing services directly. But Jackson, and other advocates of reform more "moderate" than Smith, seem not to have fully appreciated that if the network of state institutions was maintained, and if local alternatives to institutional commitment were not developed soon

[129] Smith organized a campaign of supportive letters from his statewide network of allies and friends, including none other than W. A. Criswell, the pastor of First Baptist Church in Dallas. But Briscoe also received letters from Gatesville residents and others who opposed the idea of broad deinstitutionalization, including Workman and Shamburger himself. See folder "Youth Council, Texas (appointments)," Box 172, Dolph Briscoe Papers, Center for American History, The University of Texas at Austin.

enough and on a sufficient scale, population pressures would inevitably resurface. Eventually this would become all too clear, and Jackson, who had insisted on the continuing need for institutional care, would struggle to keep the institutional population low. The failure to achieve deinstitutionalization with the judges' support, while it lasted, implied the likelihood of reinstitutionalization in the long term.

Judge Justice's ruling promised to preempt this likelihood, if its terms could be enforced. Yet, to the detriment of his own reform goals, Smith's most effective course of action as TYC chair was his legal response to the main *Morales* ruling. The appeal that he authorized ultimately yielded a reversal ruling by the Fifth Circuit in July 1976.[130] The appellate judges avoided considering the conditions Justice had painstakingly documented and focused narrowly on the technical issue of whether the *Morales* case had been subject to a law requiring the constitutionality of state statutes to be decided by a three-judge district court panel. The Texas state lawyers had argued this issue during the trial, and in his memorandum opinion Judge Justice explained at length that the unwritten rules, unrecorded policies, and prevailing institutional conditions of TYC did not follow from any particular statute and thus were not subject to the three-judge rule.[131] But the 5th Appeals Court judges contended that "despite the fact that many of these programs and policies have not been reduced to writing or otherwise formalized," the plaintiffs had nevertheless "launched an exhaustive attack on a set of practices and policies which, taken as a whole, constitute Texas' statewide program for dealing with juvenile

[130] *Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976) (henceforth *Morales* 1976).
[131] *Morales* 1974, Section III, "Necessity for a Three-Judge Court."

delinquents."[132] Moreover, they argued, the far-reaching, detailed requirements Justice sought to impose were "precisely [the] type of thoroughgoing disruption of a state's autonomous implementation of its own legislative and administrative policies that warrants the added deliberation and procedural protection provided by the three-judge court statute."[133] On these grounds, the court reversed the whole decision and remanded the case.

The Fifth Circuit's own argument proved vulnerable to further appeal. But, by one means or another, TYC and the state attorneys were increasingly determined to bring the case back before the district court. The problem for the plaintiffs, and for Judge Justice, was that the case law pertaining to the "right to treatment" had developed, subsequently to the 1974 *Morales* ruling, in a way which made it much less likely that it could support the weight that the judge had placed on it if the case was to be retried. Most critically, the Supreme Court had actually reversed the Fifth Circuit's decision in *Donaldson v. O'Connor*, which had played such a vital role in Justice's opinion.[134] Trying to save the original ruling, the *Morales* plaintiffs appealed to the Supreme Court, which in March 1977 reversed the Fifth Circuit's ruling, basically affirmed Justice's argument, and remanded the case to the Fifth Circuit.[135]

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[132] *Morales* 1976, pp. 21-22.
[133] *Morales* 1976, p. 25.
[134] See *O'Connor v. Donaldson*, 95 S.Ct. 2486 (1975). Justice Potter Stewart's majority opinion actually did not deny the right to treatment as developed in the Fifth Circuit's opinion, but argued that the case actually involved constitutionally impermissible involuntary confinement, regardless of whether treatment was provided. Only in a concurring opinion by Chief Justice Warren Burger, writing for himself, did the Court confront whether the right to treatment was valid. Burger's attack on the principle must have counted for less than the simple fact that the Fifth Circuit's ruling was no longer in effect.
[135] *Morales v. Turman*, 97 S.Ct. 1189 (1977).

But this time, the appellate judges proved receptive to the other main part of TYC's legal strategy: the reforms that Smith and Jackson had set in motion, and which Jackson had by then pursued further, as detailed at length in the supplemental brief filed by the defendants. The circuit judge suggested that Justice might have erred in failing to grant TYC's request to present additional evidence prior to issuing the 1974 ruling. But, after three more years, "those considerations which should have led to a reopening of the record in 1974 in the District Court have grown stronger with the additional passage of time. All of the arguments for permitting the state to show a change in circumstances continue to apply with greater force today."[136] What gave the arguments greater force was not just the passage of time, but also TYC's own claimed accomplishments since 1973, as cited by the circuit judge:

> Significant changes have allegedly taken place in the TYC's treatment of youths. Noninstitutional settings for the care of juveniles has been emphasized to the extent that the declining institutional population has resulted in the state's closing three of the facilities at Gatesville and transferring the Mountain View facility, a major focus in the initial trial, to the Texas Department of Corrections. For those students who are still institutionalized new programs have been developed. For example, for those youths whose evaluation indicates the need for developing self-reliance TYC operates a therapeutic wilderness camp that includes both survival skills and academic instruction. For all juveniles in its care TYC is developing a treatment program that will develop living, learning and working skills. New staff members, often members of minority groups, have been hired to help implement these programs.[137]

Of course all these claims remained "allegations," and whether they were true and reflected a transformation of institutional life that addressed all constitutional issues was (ostensibly) not for the circuit court to determine. But they were enough to require a

[136] *Morales v. Turman*, 562 F.2d 993 (1977), p. 996.
[137] *Morales v. Turman*, 562 F.2d 993 (1977), pp. 997-998.

reopening of the case: "They do indicate a new atmosphere within TYC which makes such conduct unlikely and suggest that further inquiry into the current conditions of these institutions should be made."[138] Finally, having set forth the rationale for remanding the case, the circuit judge noted the "difficulties" with the theory of the right to treatment and pronounced it "doubtful." Any remaining violations being committed by TYC must come under the Eighth Amendment standard.[139]

Through the appeals process, the state succeeded in transforming the nature of the *Morales* case and its significance. The case was now narrowed to Eighth Amendment issues, allowing for the consideration of many aspects of institutional life but setting aside the question of treatment itself—let alone the high standards of treatment Judge Justice had sought to specify, and the consequent restrictions upon institutionalization itself. Along with Smith's departure from the TYC board, the final remand of the case by the Fifth Circuit marked the passing of the opportunity for deinstitutionalization of youth justice in Texas. Even so, the case remained before Judge Justice's district court, and the judge remained committed to seeing it resolved. New discovery and other preparations for retrial were conducted, but with the judge's encouragement the plaintiffs and TYC began working out the details of a settlement. These results of the appellate litigation seem a victory most of all for Jackson, always an advocate of reforming but maintaining institutional care. The appellate judges had neatly removed the district court's pressure for broader change while retaining its pressure for the kinds of reforms Jackson himself sought—the amelioration and improvement of institutional life. As the appeals court

[138] *Morales v. Turman*, 562 F.2d 993 (1977), p. 998.
[139] *Morales v. Turman*, 562 F.2d 993 (1977), p. 999.

ruling showed, Jackson could persuasively cite legal justifications for pursuing the kinds of reforms he wished to institute anyway. With the court's discretion now scaled back, he was able to make the litigation serve his own limited purposes—for a limited time. In his own way Jackson himself seems to have believed in a right to treatment for youths, but not one which would leave control over care in the hands of a federal court.

An increasingly critical part of Jackson's strategy was the program of support for community services that TYC developed, beginning with the $9 million biennial appropriation it was able to obtain in 1975. As Jackson's cool response to Smith's frustration has indicated, he was willing to accept the paring back of the original budget request that reflected Smith's hopes. But Jackson was nevertheless no opponent of community-based services and alternatives to institutional placement *per se*. He routinely affirmed the idea that TYC should support a full range (or "spectrum") of services for troubled youth, institutional and otherwise.[140] For Jackson, as well as the TYC board members, TYC's support for community alternatives in fact began to play a crucial role, as commitments by juvenile judges began to rebound from their *Morales*-period lows.[141] From the very beginning of TYC's Community Assistance Program, as staff members developed funding criteria and procedures, the program sought to facilitate community placements not simply for their own sake, but as a way of reducing the flow of new commitments—a power which TYC and the training schools had always lacked in

[140] See Jackson quotes in "Texas: A State that Bucks the Trend," *Corrections Magazine*, September 1978, pp. 23-28.

[141] Dr. Stan Pinder reported in September 1976 that "the reputations of our institutional treatment programs have also improved and the Youth Council is now seeing a consistent 20% increase in commitments which has been underway for 27 months." See "Final Report of 1976 Community Assistance Program," TYC files, George J. Beto Papers, Thomasson Room, Newton Gresham Library, Sam Houston State University.

the past.[142] Instead of simply allocating program funds to regions or local governments based on population, TYC developed a funding formula that weighed the rate of commitments by county authorities to TYC over the preceding ten years, and also the number of new commitments made in the course of a year by a county above or below a "base commitment rate."[143] The purpose was to try to direct available funds to counties that both needed the assistance and were successfully using it to divert offenders. The board even added a requirement that grantees answer the question "By how many will implementation of this grant reduce commitments to the Texas Youth Council you're your area, as compared with last year's commitment rate?"[144]

Perhaps inevitably, TYC's effort to tailor community assistance to its own needs stirred an uproar among juvenile judges—including some who had supported TYC's funding request before the Legislature—and county probation officers. With a relatively limited amount of grant funds available to offer, TYC appears to have cost itself more in terms of influence by invading the perceived prerogatives of local judiciaries than it gained by providing the funds. One county judge, notifying TYC of his county's withdrawal from the assistance program, complained that the system "penalizes those counties who have previously instigated good services and rewards those counties who

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[142] See remarks of Dr. Stan Pinder, Director of Community Services, in minutes, TYC board meeting, June 24, 1975, pp. 16-18, Box 1998/213-1, Records, Texas Youth Commission. Archives and Information Services Division, Texas State Library and Archives Commission. Pinder is quoted as explaining that the program he was charged with developing would have as its purpose "to assist local communities in the reduction and prevention of juvenile delinquency," which (at least according to the minutes transcript) would be accomplished by contracting with local public and private service providers, "diverting youth from the juvenile justice system, and reducing commitments to TYC."

[143] See Texas Youth Council Annual Report for 1975. Also explanation in letter, Stan Pinder to Hon. Leonard J. Giblin, Jr., 7/13/76, pp. 4-5, TYC files, George J. Beto Papers, Thomasson Room, Newton Gresham Library, Sam Houston State University.

[144] Minutes, TYC board meeting, Nov. 20, 1975, p. 6.

have not accepted their responsibility," and also that it "puts a quota on the Judge as to the number and type of decisions that he may make, which is completely adverse to the inherent powers of the Court to perform its function."[145] A reply letter written by Stan Pinder, the TYC staffer who devised and administered the Community Assistance Program, complained that "several Chief Juvenile Probation Officers in the state have made criticisms of TYC so vocally to so many individuals and organizations about everything TYC has ever done or is attempting to do at this time."[146] Pinder insisted that other county officials appreciated TYC's support, but clearly few if any of them could be expected to support TYC's control over state funding over time. Governor Briscoe registered his own responsiveness to TYC's critics by refusing to release a portion of the appropriated funds for community assistance for a period of months, claiming that the effectiveness of the experimental program had yet to be demonstrated, and effectively forcing TYC to cut back many of its planned grants during its first year of operation.[147] All this controversy bought TYC a very small number of diversions, at least in the first year. TYC was able to make small grants to sixteen county probation departments and several local private juvenile facilities. At the end of fiscal 1976, Pindar compared commitment rates from counties before and after the grant disbursements and estimated that the community assistance had diverted a total of some 37 commitments.[148]

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[145] Letter, Leonard J. Giblin, Jr. (county judge, Jefferson County), to Ron Jackson, 7/2/76, TYC files, George J. Beto Papers, Thomasson Room, Newton Gresham Library, Sam Houston State University.
[146] Letter, Stan Pinder to Hon. Leonard J. Giblin, Jr., 7/13/76, p. 8, TYC files, George J. Beto Papers, Thomasson Room, Newton Gresham Library, Sam Houston State University.
[147] For an explanation of Briscoe's attempted impoundment of appropriated funds, see Molly Ivins, "Briscoe and the TYC funds," *Texas Observer*, 3/12/76, pp. 1, 3, and Randy Fitzgerald, "About those TYC funds," *Texas Observer*, 7/2/76, p. 7. Pindar noted the exact impact on TYC grant disbursements in "Final Report of 1976 Community Assistance Program," p. 3.
[148] "Final Report of 1976 Community Assistance Program," attached table.

Jackson and the TYC board appear to have hoped that by successfully administering a community assistance program over time, they could build enough credibility that larger appropriations would follow in the future.[149] But, somewhat like Smith's previous effort to take advantage of Justice's ruling while opposing it, TYC's strategy of building up a grant program under its control while alienating many of its intended beneficiaries seems to have been doomed by its own flawed conception. If Smith could not win a larger appropriation when TYC had the support of most local juvenile justice officials, then the agency was presumably unlikely to prevail in the future over the objections of its former allies. By 1978, as proposals circulated for restructuring of state funding for juvenile justice and probation assistance, juvenile judges and probation officers had organized to demand their own dedicated source of state grant funding separate from TYC's control.[150] In the ensuing legislative session Jackson worked with one of his most powerful allies, Lieutenant Governor Bill Hobby, who refused to allow a vote on the juvenile judges' bill in the closing hours of the session. The judges, including the reform-minded former senator Criss Cole, were further outraged, and during the following interim period between general sessions TYC appears to have given up the fight.[151] In 1981, the Legislature quietly passed the creation of a

[149] Shortly before being forced off the board, Forrest Smith actually stated this view on behalf of the council as a whole, defending the council's efforts against objections from a local judge: "Mr. Smith explained that the Texas Youth Council recognizes that the Community Assistance allocation is a small amount and cannot possibly meet all the needs in the communities. However, if TYC demonstrates that these funds can be utilized effectively, it is hoped that the Legislature will allocate more funds during the next biennium." Minutes, TYC board meeting, August 26, 1975, p. 4.

[150] See Report to the Senate of the 66th Legislature by the Interim Subcommittee on Juvenile Crime, 1/17/79.

[151] See letter, Criss Cole to William P. Hobby, 6/1/79, in folder "Juvenile Probation Commission," Box 1991/068-30, Records of William Pettus Hobby, Jr., Texas Office of the Lieutenant Governor, Archives and Information Services Division, Texas State Library and Archives Commission.

Texas Juvenile Probation Commission, to which TYC's Community Assistance Program was transferred in full.

Jackson, working with general counsel Neil Nichols and with the TYC board, was considerably more successful in his handling of the *Morales* case as it finally concluded. Charles Sandmann, the longtime plaintiffs' counsel, later said he had concluded that, given the narrowing of the case, "the institutions had improved enough that we could not win another lawsuit."[152] For his part, Jackson was sympathetic to virtually all of the original goals of the plaintiffs that did not involve deinstitutionalization or the loss of TYC's authority over its institutions. In the settlement negotiations, TYC largely accommodated the plaintiffs' demands for detailed standards for many of the issues contained in the original litigation, such as classification, employee training, regulation of use of force and other disciplinary measures, and even the provision of educational programs and treatment services. The sticking point for the state was the way in which its compliance with the agreement's terms would be enforced. On this question Judge Justice was actually more insistent than the plaintiffs' attorneys themselves. When Sandmann and TYC officials completed their negotiations in early 1983 and submitted the draft settlement for the court's approval, Justice actually rejected it, on the grounds that the enforcement provisions were too weak.[153] Viewing Sandmann as overly inclined to accommodate TYC on this point, he actually forced the plaintiffs' attorneys to raise their monitoring demands by threatening to appoint an additional independent counsel to

[152] Kemerer, *William Wayne Justice*, p. 175.
[153] See initial proposed settlement agreement, 3/3/83, and Kemerer, *William Wayne Justice*, p. 175.

represent the plaintiff class.[154] Unwilling to leave enforcement of a contractual agreement in the hands of a state court, he also rejected a revised agreement that included an expert panel of monitors, on the grounds that the panel was insufficiently funded. "This is very important litigation," he told both parties, "and I don't propose to see it go down the drain."[155] Jackson, as he later acknowledged, was indeed seeking to limit the extent to which enforcement arrangements would restrict TYC's freedom of action, but in the end he could live with some monitoring.[156] The version of the settlement that Justice finally approved on April 16, 1984, which brought an end to the litigation of the *Morales* case, provided sufficient funds for an expert panel to monitor and report on TYC's compliance for four years.[157]

At the time, the end of the litigation was cited by all parties as a major accomplishment. For Ron Jackson and for TYC, freeing the agency from the mandate of the federal court was an accomplishment that stood in sharp contrast to the failed resistance and continuing struggles of the Texas Department of Corrections, then still mired in the *Ruiz* case. Justice also expressed satisfaction at the final resolution of the case, and how far TYC had come in the years since the trial.[158] Despite the reversal of his 1974 ruling, the ruling was widely hailed and cited as a catalyst for progressive court-

[154] Kemerer offers a particularly lucid and revealing explanation of how Justice forced the strengthening of the plaintiffs' position, and the monitoring provisions of the settlement he finally approved, in *William Wayne Justice*, pp. 175-179.
[155] Kemerer, *William Wayne Justice*, p. 175.
[156] Kemerer records Jackson's acknowledgement of the logic underlying Justice's objections: "It was, I think, the money issue. They couldn't adequately monitor the settlement agreement. And that was our strategy. We didn't want them monitoring. And he caught it immediately." *William Wayne Justice*, p. 177.
[157] *Morales v. Turman*, Second Amended Settlement Agreement, and Order Approving Second Amended Settlement Agreement, 4/16/84.
[158] Justice formally acknowledged that "conditions have so much improved within the Texas Youth Commission that substantial injunctive relief is no longer a likely result of a trial on the merits." See Order Approving Second Amended Settlement Agreement.

induced change.[159] His satisfaction with the monitoring arrangements, for which the plaintiffs engaged a team of expert academics in juvenile development, appears as one more sign of his commitment to professional authority as a source of legal standards which could effectively secure people's rights. But by comparison with the standard-setting that the right to treatment had allowed him to pursue, it was a cramped vision of reform that he now embraced, reflecting a professional consensus that was itself chastened by countervailing legal and political currents.

Most critically for TYC, victory in limiting and ending judicial oversight, together with loss of leverage over local jurisdictions and community placements, left all of Jackson's other priorities—most of all the maintenance of limits on institutional capacity, so that the quality and intensiveness of institutional services could be maintained—fully at the mercy of local authorities and whatever broader factors would impact their commitment rates. By the early 1990s, when rising juvenile crime rates helped drive a dramatic rise in commitments, TYC was unable to prevent overcrowding, unable to maintain the minimum lengths of stay that its educational and rehabilitative curricula required, and unable to retain its own credibility as an agency advocating care over punishment. Its forced embrace of expanded institutional capacity and a return to harsh discipline as a theme of daily life were seen as reflections of a more punitive public climate, but they also reflected the weaknesses and failures of professionally guided, judicially induced reform.

[159] Kemerer cites the use of Justice's ruling as a basis for standards written by national juvenile correctional professional organizations at *William Wayne Justice*, p. 181.

Chapter 5

To Do No Harm: Medicine and the Death Penalty in England and Texas

The "medicalization" of the death penalty, by the 1990s and early 2000s, was both a well-developed part of ongoing practice and a leading theme of the perennial debate surrounding the practice. Spurred by legislative debates and continuing litigation over the use of legal injection, advocates of abolition brought greater publicity to the extent of physician participation in the carrying out of executions and the acquiescence in this degree of involvement by the medical profession more generally.[1] Physicians and medical ethicists contributed their own reflections on this issue, sometimes noting the failure of the profession as a whole to constrain effectively its individual members.[2] State medical associations and the AMA all proscribed the involvement of doctors in putting condemned prisoners to death, but in almost all cases the rules were intended

[1] See American College of Physicians et al, *Breach of Trust: Physician Participation in Executions in the United States* (published March 1994); Robert G. Truog and Troyen N. Brennan, "Participation of Physicians in Capital Punishment," *New England Journal of Medicine*, Vol. 329, No. 18 (Oct. 28, 1993), pp. 1346-1350; Amnesty International, *Lethal Injection: The Medical Technology of Execution* (published Jan. 1998); and Human Rights Watch, *So Long As They Die: Lethal Injections in the United States*, Vol. 18, No. 1(G) (April 2006).

[2] Key recent examples include Atul Gawande, "When Law and Ethics Collide—Why Physicians Participate in Executions," *New England Journal of Medicine*, Vol. 354, No. 12 (3/23/06), pp. 1221-1229; and Peter A. Clark, "Physician Participation in Executions: Care Giver or Executioner?" *Journal of Law, Medicine, and Ethics*, spring 2006), pp. 95-104. The debate within medicine, which had continued to brew since the introduction of lethal injection, was stimulated further by questions newly raised regarding the specific procedures employed. See Leonidas G. Koniaris et al, "Inadequate anaesthesia in lethal injection for execution," *The Lancet*, Vol. 365 (4/16/05), pp. 1412-1414, and the related editorial in the same issue, "Medical collusion in the death penalty: an American atrocity," p. 1361.

mainly to protect the associations themselves from being linked to the practice, rather than to ensure that no doctors were involved.[3]

Critics of medicalized execution protocols implied that the development compromised medical ethics in disturbing new ways, linking it to a broader narrative of professional decline. In fact, the history of the death penalty in modern Western civilization was always connected to the history of medicine in various ways, and the fate of capital punishment in the 20th century was no exception to the rule. While contemporary medical techniques for determining criminal responsibility and executing condemned criminals might be new in their particular details, in a larger sense they are neither unprecedented nor unanticipated within the medical, legal, and political realms. The same kinds of advances in professional knowledge, and the same kinds of professional organizations, could serve to promote capital punishment in one historical context and to help abolish it in another.

While the identification of Texas as the death penalty capital of America usually rests on its disproportionately large share of executions carried out, the claim also has a strong historical basis. The state was the first to perform a lethal injection, and it developed methods and protocols which others would also employ (including the use of the hospital gurney and other mimicry of medical procedures). Less heavily publicized (although still notorious, and perhaps equally important) was the state's pioneering use of psychiatric testimony in sentencing convicted defendants to the gurney. In part because

[3] Some years after lethal executions had been initiated, a new round of state and national medical-professional resolutions and legal cases were provoked by new laws in several states, including Illinois and California, which sought to ensure the precise carrying out of execution procedures by mandating doctor inclusion. See *So Long As They Die*, pp. 39-42.

the controversies and news coverage surrounding these practices are so familiar—part of the background noise of life in Texas, even for the vast uninvolved majority of the public—a comparative historical perspective may prove helpful in gauging their significance. In the case of England, many of the same developments that characterized capital punishment in Texas were at least anticipated and discussed, but ultimately history took a very different path. I argue that the comparison bears out the critical role of medicalization in determining the fate of capital punishment—and that the historical divergence between the cases studied reflects a divergence between medical professions in their social and political contexts.

I.

In Albion, known for its fatal tree and "Bloody Code," the abolition of capital punishment was the work of many generations. The rise of commerce and industry, agricultural enclosure, and related social unrest coincided with a chaotic proliferation of capital-offense statutes—and a rising crimson tide of dispatched offenders. Then, as middle-class reformers gained parliamentary influence, capital crimes were pared back and the ritual of hangings in public was ended (although whether the accompanying cultural shift was toward humanitarianism or sentimental hypocrisy remains in dispute).[4] But by blunting the momentum for abolition, these limitations helped sustain the

[4] See V. A. Gatrell's argument in *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford Univ. Press, 1994).

practice.[5] After the 1860s, death by hanging remained the prescribed penalty for murder for very nearly a full century.

At a distance, with the passing of decades since the last legal executions were carried out, and with the death penalty now banned by the European Convention of Human Rights, abolition in 20th-century Britain may now be half-remembered as a necessary response to social transformation and shifting values. But any closer look at the political battles over abolition shows otherwise—that the outcome was anything but inevitable. "It is quite possible," in the view of one magazine writer, "that, had there not been a resurgence of abolitionism following the Second World War, Britain would have gone down the same path as the United States," with capital punishment perpetuated once again by being modified and brought up to date.[6]

The critical moment, in this view, came in the wake of a parliamentary initiative that ended in defeat for the abolitionist cause—and threatened to bring the reinforcement, rather than the abolition, of capital punishment in Britain. In 1948, with Clement Attlee's Labour government committed to passage of a comprehensive criminal-justice reform bill, party backbenchers unexpectedly succeeded in attaching an abolition amendment—only to have the amended bill resoundingly rejected by the House of Lords, with the apparent support of the general public. Ultimately all the insurgents had to show for their efforts was the creation of a royal commission to study possible reforms in sentencing

[5] See the discussion of the Royal Commission report of 1866 in Leon Radzinowicz and Roger G. Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (New York: Oxford Univ. Press, 1986), chapter 20, especially pp. 661-671 and 685-688.

[6] See Tom Phillips, "The Abolition of Capital Punishment in Britain: The End of the Rope, Part 1," *Contemporary Review*, Vol. 272, No. 1585 (1998), pp. 57-63. Phillips' one observation about the Royal Commission on Capital Punishment that reported in 1953 was that it "concluded hanging was no deterrent but failed to recommend abolition" (p. 62), which seems a fair example of the abolitionist perspective on the commission's work.

and procedures (not to include abolition itself). Instead of confirming the obsolescence of the Bloody Code's remnants, this outcome demonstrated what one historian calls "the enduring political, judicial, and public resistance to the reforming ethos."[7] What finally undermined this resistance was a trio of dubious capital cases—occurring, almost unbelievably, in rapid succession—which sapped the credibility of the justice system and highlighted the irreversible consequences of its failings.[8]

Compared with these controversies and with the acts of legislation that followed them, the work of the Royal Commission on Capital Punishment of 1949-1953 has often been viewed as having played a secondary role (at most) in promoting change. With the terms of its appointment ruling out consideration of abolition as a policy alternative, it had no opportunity to register any direct support for the cause, and ultimately few of its necessarily limited recommendations were ever adopted. What such assessments overlook is the potential significance of the commission as a force for perpetuating the death penalty, instead of the opposite. Along with their mandate, the commissioners were given the opportunity to propose the kinds of modernizing changes that might well have sent Britain down the American path in following years. In fact, the commissioners' refusal to endorse such changes was itself a historic defeat for the death penalty in Britain—and a crucial victory for the cause of abolition, made all the more significant by the commission's lack of positive identification with the cause.

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[7] Victor Bailey, "The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51," *Law and History Review*, Vol. 18, No. 2 (2000) p. 349.

[8] A convenient summary of the successive Bentley-Craig, Evans-Christie, and Ruth Ellis cases and their impact on public discussion of capital punishment is provided by Brian P. Block and John Hostettler, *Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain* (Winchester: Waterside, 1997), chapters 17-19.

The royal commission's conclusions were not preordained. They depended heavily on the recommendations and testimony provided by a host of witnesses over two years of hearings. On the key practical questions relating to the reform and modernization of the death penalty—how to reconcile the definition of criminal responsibility with the views of modern psychology and psychiatry, and how to reconcile the method of execution with modern standards of humane treatment—those representing the medical profession had a critical role to play. I argue that the leaders of the profession—most importantly the representatives of the British Medical Association—acted so as to foreclose the possibility that a modernized, medically sanctioned death penalty would emerge from the commission's work. The BMA never endorsed the abolitionists' cause—and, as with the commission itself, avoiding being identified with the cause was necessary for the maintenance of its standing and influence. But it maintained longstanding objections to the existing legal definition of responsibility (insisting instead on a definition which, while accommodating the views of experts on mental disease and deficiency, posed insoluble political dilemmas of its own). And it steadfastly refused to endorse or facilitate execution by lethal injection, leaving the commission without an alternative to hanging that it could recommend. The leading medical men in Britain had no interest in allowing their profession to be seen as agitating against capital punishment—but neither would they tacitly support the practice, at a time when it required this support. Ultimately Britain followed the European path of abolition, rather than the American path of modernized capital punishment, for reasons

large and small. The large ones included the position of the British medical establishment and the influence that it wielded.

The objections of British medical men to the common law's test of criminal responsibility were part of a longstanding critique of the prevailing legal standard of mental guilt (or *mens rea*)—a critique which accompanied the gradual development of psychiatry as a medical discipline and followed from its core assumptions. The standard came from the controversy that followed the acquittal, on grounds of insanity, of political assassin Daniel M'Naghten in 1843. Replying to questions from the House of Lords, a panel of judges concluded that juries, when necessary, should be instructed

> that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

The fateful adoption of the M'Naghten Rules by both English and almost all American state courts reflected jurists' satisfaction with narrow formal limits on jurors' discretion. Psychiatrists and psychologists were dissatisfied from the beginning. Their objection, in essence, was that the reference exclusively to cognitive failures meant that the rules applied strictly only to some mentally diseased defendants and excluded others who were equally unable to control their actions.[9] The definition of responsibility solely in terms of

[9] The Royal Commission report itself provided a scholarly historical survey of the origins of the M'Naghten Rules and the longstanding objections of medical men. See Royal Commission on Capital Punishment (1949-1953), *Report* (London: H.M. Stationery Office, 1953) (hereafter Royal Commission report), specifically Appendix 8(d) (pp. 397-406).

knowledge, leaving out all other mental conditions affecting the ability to act (or not act), ran counter to the very construction of mental malfunction in medical terms—as a form of disease affecting the mind as a whole.[10] Strict application of the M'Naghten Rules meant that expert medical witnesses found their testimony limited to the state of a defendant's knowledge, regardless of their overall diagnosis of the defendant's mental state. While judges viewed the limitation of the scope of psychiatric testimony as necessary to keep medical men from dominating trial outcomes, the medical men saw the rules as a rejection of the value of their professional expertise—all the more so as the state of their art developed over time while the rules stood unchanged.

The British Medical Association's longstanding sponsorship of the psychiatric critique of *M'Naghten* was both a bid for influence over criminal justice, on behalf of the medical profession, and a typical assertion of the BMA's own status as representative of the profession at large. The BMA's leaders normally exercised a certain prerogative to speak on behalf of the profession and "medical practitioners" generally. In fact, a class divide separated the emerging mass of general practitioners, whose own organization grew into the BMA itself, from elite specialists and consultants, who retained their affiliations with traditional orders (the ancient and prestigious Royal Colleges). But the GPs' growing numbers and success in organizing their own ranks enabled them, beginning in the middle of the 19th century, to win substantial control over the whole profession and the course of its development. The long war over extending national health insurance, culminating in the Labour Government's introduction of the National

[10] The Royal Commission report cites the eminent Victorian legal scholar Sir James Fitzjames Stephen as the leading exponent among jurists of the view of *M'Naghten* which the report attributes generally to medical men. See Royal Commission report, p. 80, and Appendix 8(d), pp. 399-401.

Health Service, illustrated the BMA's sense of its own prerogatives and the limits of its actual influence. Like its American counterpart—but with less success—the BMA fiercely opposed publicly funded provision of health care, and mobilized doctors to join in defense of the "doctor-patient relationship" and other purported values of the profession. In 1947-48, its efforts failed, in large part because Health Minister Aneurin Bevan broke down the opposition by exploiting the old intraprofessional divide. But even in defeat, the BMA retained both a formal role and considerable influence as the GPs' representative in advising and bargaining with the Ministry of Health, inspiring later commentary on a health service functioning less for its patients than for its professionals.[11]

As with the campaigns against national health insurance, the BMA's longstanding opposition to *M'Naghten* invoked the values of medicine while asserting its professional prerogative. The association first took this stand before a study panel (the Committee on Insanity and Crime, chaired by Lord Atkin) appointed in 1922, in the wake of a legal controversy over a murder conviction followed by a medical reprieve. Both the BMA and the psychiatrists' own group (the Medico-Psychological Association) came before the committee to criticize the M'Naghten Rules and propose alternatives. The BMA's

[11] Key secondary sources on the BMA and its role in the politics of health care include Peter W. J. Bartrip, *Themselves Writ Large: The British Medical Association, 1832-1966* (London: BMJ, 1996), especially chapter 10 (pp. 248-266), and Harry Eckstein, *Pressure Group Politics: The Case of the British Medical Association* (Stanford Univ. Press, 1960), which contrasts the BMA's seemingly high-profile failures with "a much more impressive record of not-so-public successes, greatest of all on minor matters, points of 'detail,' but impressive also in the case of 'principles'" (p. 96). In *Health, Happiness, and Security: The Creation of the National Health Service,* Frank Honigsbaum also offers a revisionist argument about the institutional politics of national health legislation but reaffirms the basic understanding of the undermining of the BMA's position by Bevan's collaboration with Lord Moran, then president of the Royal College of Physicians, at pp. 148-150. Asa Briggs reviews Lord Moran's role in *A History of the Royal College of Physicians of London, Volume 4* (New York: Oxford Univ. Press, 2005), pp. 1296-1310.

memorandum recommended that the rules should also exclude actions in which mental disease or deficiency kept a person "from controlling his own conduct." The existing formula as amended, according to the BMA Council, "might be accepted by the Medical Profession as a fair definition of responsibility for crime."[12] (Rather than trying to amend the rules, the Medico-Psychological Association concluded that they should simply be abrogated, and "the responsibility of a prisoner should be left as a question of fact to be determined by the jury on the merits of the particular case.")[13] Ultimately the Atkin Committee basically adopted the BMA's position—recommending that defendants not be held responsible "when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist."[14]

The BMA's contributions to the Atkin Committee's work forged a fateful connection with the debate over capital punishment itself—although the BMA avoided being drawn directly into this larger debate. Despite the Atkin Committee's work, or perhaps because its conclusions were unexpected, its report was set aside by the government upon its submission. But abolitionists took note of the medical-legal divide over the insanity defense. In 1929, Labour Party leaders under pressure from their abolitionist members appointed a House of Commons Select Committee on Capital Punishment. Reflecting the closely balanced forces in the Labour-led chamber, the committee narrowly approved a report which mainly addressed the question of abolition and recommended a five-year moratorium on executions. But it also identified

[12] The Report of the Committee on Insanity and Crime of 1923 is quoted in Royal Commission report, Appendix 8(d), para. 16, p. 404.
[13] Royal Commission report, para. 16, p. 404.
[14] Royal Commission report, p. 405.

conditions for any further use of the death penalty—one of which was "bringing the M'Naghten Rules up to date, so as to give the fullest scope to general medical considerations and to extend in some way the area of criminal irresponsibility."[15] The select committee did not call medical men to testify, but instead invoked the gist of the BMA's recommendations to the Atkins Committee—as well as the accompanying implication that rejection of the law's rules of criminal responsibility was intrinsic to modern medicine.

The BMA remained similarly detached from the battle in Parliament over abolition in 1948. The "Medical Profession," like other established institutions—including the leadership of the Labour Party itself—had no interest in being identified with abolitionists or spending its political capital on their cause. Surveys indicated that the death penalty retained longstanding majority support among the British public, and advocates of abolition had traditionally acted as dissenters from an established consensus, among society at large or within their own institutions. Supporters of abolition included a few contrarian nobles and bishops, a subgroup of middle-class reformers who specialized in criminal justice, and a more substantial number of Labour politicians and constituents who expressed class grievances, sympathy with reform views, or both. By the late 1940s there were two respected but small organizations that advocated for the cause: the Howard League for Penal Reform (which, through its research and lobbying, served as the standard-bearer of progressivism in criminal justice, while maintaining close ties with the Home Office) and the National Council for the Abolition of the Death

[15] The Report of the Committee on Insanity and Crime of 1923 is quoted in Royal Commission on Capital Punishment (1949-1953), *Minutes of Evidence* (London: H.M. Stationery Office, 1949-1951) (hereafter Royal Commission minutes), 8/4/49, para. 94, p. 13.

Penalty (which existed more as a one-person operation than as an actual council, and ultimately folded itself into the Howard League).[16] Staunch opponents included the leaders of the Conservative Party, the entire judicial establishment, and the Church of England.[17] The questions debated among these forces in Parliament—whether capital punishment was morally acceptable, whether it affirmed or denied the sanctity of human life, whether it served to deter murder—were mostly outside of medicine's realm.

The issues of dispute changed with the appointment of the Royal Commission on Capital Punishment. As approved by Attlee and the rest of the cabinet, the commission's assigned topics included "whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what extent and by what means." The question of abolition itself had actually been included in the commission's terms of reference as first proposed to the cabinet, but had been removed at the cabinet's insistence.[18] What remained in the terms of reference was generally understood as a reference to the idea of creating degrees of murder, which had never existed in English law. But in a broader sense, taking abolition off the table necessarily implied that the commission was to serve an anti-abolitionist function—finding ways of adjusting and improving existing practices so that the death penalty itself could be made most widely acceptable.[19] In keeping with this broad purpose, Attlee later

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[16] Gordon Rose describes the work and illustrates the perspective of the Howard League in *The Struggle for Penal Reform* (Chicago: Quadrangle Books, 1961).

[17] See Harry Potter, *Hanging in Judgment: Religion and the Death Penalty in England from the Bloody Code to Abolition* (London: SCM Press, 1993), especially pp. 142-166 (including chapter 14, "Godly Butchery," on the Church of England's longstanding reliance on the symbolic power of the execution ritual).

[18] Bailey states this finding from primary sources in "The Shadow of the Gallows," at p. 345.

[19] Characterizations of the unenthusiastic response of abolition supporters (who were not aware of the commission's appointment until the public announcement) implies that they merely expected the

asked the panel to consider "methods of execution" as well.[20] Attlee and his fellow cabinet members also obviously wanted a thorough inquiry that would be sure to continue until after the next general election. The chosen members of the panel, chaired by veteran civil servant Sir Ernest Gowers, represented varied specialties and were apparently chosen for their lack of known commitment to either side of the abolition debate.[21] As it turned out, the commission held hearings for two years, followed by research travel, and did not release its report until 1953.

The terms of reference directed the commission back to the old unsettled argument over criminal responsibility—as well as the broader question of how the medical profession could help serve the commission's task of proposing a new, improved death penalty. Shortly after its appointment, the commission formally invited the BMA to submit evidence. During the months leading up to the BMA's appearance before the commission, the association's Council found itself having to consider not only its longstanding position on *M'Naghten* but also how it would field other likely questions. At the Council's formal meeting on January 18, 1950, it became clear what exactly that meant:

> The chairman of the Committee [on Capital Punishment] stated that possibly the Royal Commission might contemplate recommending intravenous injection as a method of execution if it were assured that the medical profession would not object to the prison medical officer being required to give a preliminary injection

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commission to be unhelpful to their cause. I maintain that the commission actually had the opportunity to do far-reaching harm to the cause, which may be more apparent in retrospect (and in comparison with the United States). Bailey interprets the terms of reference to imply "some new method of classifying murders by degrees, which the Lords had ridiculed, the Opposition in the Commons had opposed, and the abolitionists disliked." See "The Shadow of the Gallows," p. 345.

[20] See the beginning of Chapter 13, "Methods of Execution," at Royal Commission report, para. 700, p. 246.

[21] James B. Christoph, *Capital Punishment and British Politics* (Univ. of Chicago Press, 1962), p. 79.

> of a narcotic drug for the purpose of facilitating the lethal injection by a non-medical examiner.

The committee chairman went on to report that the committee "had considered this possibility" and concluded that while the prison medical officer's actions "must remain a matter for his professional discretion," nevertheless "in no circumstances could the profession approve of the medical officer being under instructions to carry out an injection as a preliminary to the execution procedure."[22]

The Council endorsed this position, while also voting its approval of the memorandum drafted by the capital punishment committee and the list of witnesses to testify before the commission. One other piece of information reported to the Council by the committee reflects the association's continuing concern over its representation of the profession as a whole. The psychiatrists' organization (now, with its crown charter, titled the Royal Medico-Psychological Association) had also been asked to address the commission and, like the BMA, was expected to discuss the M'Naghten Rules in light of its past statements to the Atkin Committee. A representative of the RMPA had explained the psychiatrists' views to the BMA committee, much to the committee members' dismay:

> The Committee had hoped that the BMA and the RMPA, which have given conflicting evidence in the past on the revision of the M'Naghten Rules, would be able to speak with one voice on the present occasion. It regrets to report that the views expressed in its memorandum cannot be reconciled with those of the RMPA.[23]

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[22] Minutes of the BMA Council, 1949-1950, p. 6, in British Medical Association Collection (SA/BMA), Box 268, Wellcome Library, London (hereafter BMA Collection).
[23] Minutes of the BMA Council, 1949-1950, Appendix I, p. 14, in BMA Collection, Box 268.

Before the medical men appeared, the Royal Committee held thirteen full days of hearings over five months, starting with the Home Office and continuing through the organizations representing law enforcement, the prison services, and the judiciary—all emphatic supporters of the death penalty, all tending to echo the positions which had prevailed in the recent parliamentary debate. Especially with eminent legal witnesses, the commissioners devoted much attention to the question of degrees, the "constructive malice" doctrine, and other issues and possible modifications in the law of murder. But the panel also drew out witnesses' views on the M'Naghten Rules and the question of alternative execution methods. Virtually none of the early witnesses acknowledged any misgivings about hangings. But on the law of criminal responsibility, things were slightly more complicated. Only a few were now willing to insist that the M'Naghten Rules precisely identified an appropriate strict standard of responsibility. But most still supported the rules as they stood, arguing that a loose interpretation of them was now customary and that judges and juries exercised their discretion to stretch them when appropriate. In large part, the defense of the status quo had pivoted away from the rules themselves and now rested on how they were applied. "Most of these witnesses," according to the final report, "recognized the imperfections of the Rules, but argued that the formula worked well enough in practice and that it was impossible to devise a better one which a jury would be able to understand and apply—or at least that no one had ever succeeded yet in doing so."[24]

[24] Royal Commission report, para. 244, p. 86.

The BMA submitted its memorandum in January 1950 and gave evidence before the Royal Commission on February 3. The memorandum offered a reworked statement of the BMA's position on M'Naghten and tried to relate it to the new state of the debate and the kinds of arguments the commission had been hearing. According to the memorandum, the BMA acknowledged the necessary difference between insanity, as defined by medicine, and irresponsibility, as defined by law. Thus "instead of criticizing the M'Naghten Rules as embodying a conception of insanity which is obsolete, it prefers to criticize them as embodying a conception of irresponsibility which, in the light of modern psychological knowledge, must be regarded as incomplete."[25]

The memorandum cited two arguments being used to defend the M'Naghten Rules in practice—that judges had leeway to apply them loosely, and that another safeguard existed in the form of the post-verdict review that the Home Secretary was required by statute to conduct. In the first case, the memorandum noted the likelihood of starkly conflicting conclusions by different judges on similar cases. As for relying on the Home Secretary, the memorandum suggested that it reduced the solemn trial to "a grim farce" and transferred to the executive "a grave responsibility that properly rests with the court." Neither argument amounted to a vindication of the rules themselves:

> In the first case, the inexactness of the Rules is acknowledged, the claim being that, by reason of their inexactness, the Judge can extend their application at his discretion to meet the circumstances of the individual case. The second argument frankly admits the imperfections of the Rules and claims merely that the resulting errors are subsequently rectified outside the court.

[25] "Memorandum Submitted by the Council of the British Medical Association," para. 9, in Royal Commission minutes, 2/3/50 (hereafter BMA memorandum).

Either way, the BMA insisted that the defense of the rules in practice ultimately served to show their insufficiency on their own terms—as a statement of the conditions of legal irresponsibility.[26]

The BMA's own recommendations followed from its own restated analysis of the essential flaw in the M'Naghten Rules—that their definition of irresponsibility was "incomplete." To show how incomplete they were, the memorandum cited an appeals court ruling that a defendant's awareness of the illegality of an action made it impossible to claim that he "did not know he was doing what was wrong," as the rules required—which would mean assigning responsibility even to "an insane person who clearly knew that his act was punishable by law, but believed that he was called upon by the Deity to commit the act."[27] But even if a judge avoided this kind of conclusion by fudging the rules—or interpreting them "loosely"—the basic problem of irresistible impulse (or inclination) would remain. Acknowledging that the rules did not amount solely to a test of cognitive faculty—that they accounted for emotional states that interfered with cognition—the BMA nevertheless reiterated its long-held view that "awareness of the nature and wrongfulness of the act may co-exist with a state of emotional disorder, resulting from mental disease, of such a nature that the person so afflicted does not possess sufficient power to prevent himself from committing the act." The M'Naghten Rules "cannot cover such cases unless the meaning of the words is stretched beyond any reasonable interpretation."[28] As in its statements to the Atkin Committee, the BMA again proposed language to enable the M'Naghten Rules to cover such cases. This time the

[26] BMA memorandum, section II, paras. 7-14, Royal Commission minutes, 2/3/50.
[27] BMA memorandum, section II, para. 20, Royal Commission minutes, 2/3/50.
[28] BMA memorandum, section II, para. 21, Royal Commission minutes, 2/3/50.

formulation referred to "a disorder of emotion such that, while appreciating the nature and quality of the act, he did not possess sufficient power to prevent himself from committing it."[29]

At the same time that it proposed expanding the definition of irresponsibility, the BMA found it necessary also to endorse the idea of degrees of responsibility, or "diminished responsibility," which existed in Scottish but not in English law. According to the memorandum, "there are mentally abnormal persons charged with murder who cannot be absolved from all responsibility but whose responsibility should be held to be so reduced . . . as to make it undesirable that they should suffer the extreme penalty."[30] In their appearance before the commission, the BMA witnesses noted that "diminished responsibility" was no substitute for expanding the M'Naghten Rules—it could not cover cases of full irresponsibility due to insanity—but it was necessary to include it "if we are to be in line with scientific developments."[31] It must have also seemed prudent to offer reassurances that a medically sanctioned expansion of full irresponsibility would not open the door too wide.

The memorandum devoted a separate section to alternative execution methods, which made clear the BMA's apprehension about the prospect of being pressured to sanction lethal injection. "No medical practitioner should be asked to take part in bringing about the death of a convicted murderer," the document stated. "The Association would be most strongly opposed to any proposal to introduce, in place of judicial hanging, a method of execution which would require the services of a medical

[29] BMA memorandum, section II, para. 25, Royal Commission minutes, 2/3/50.
[30] BMA memorandum, section II, para. 23, Royal Commission minutes, 2/3/50.
[31] Examination of Witnesses, para. 4008, Royal Commission minutes, 2/3/50.

practitioner, either in carrying out the actual process of killing or in instructing others in the technique of the process."[32] Based on its study of previous testimony before the commission, and its own discussion with a prison medical officer, "the Association considers that hanging is probably as speedy and certain as any other method that could be adopted."[33] Intravenous injection of a narcotic drug would be "a speedy and merciful procedure"—except that "the practical difficulties encountered in many cases when injection into a vein is attempted are such as to render the method quite unsuitable for the purpose of execution."[34] Other injection methods (subcutaneous or intramuscular) "would not bring about sudden death or instantaneous loss of consciousness."[35] The memorandum went so far as to suggest gas as perhaps "the best alternative to the present procedure," albeit "one which has highly unpleasant historical associations."[36]

The memorandum included a brief passage indicating the position reached by the BMA Council on possible requirements placed on prison medical officers. It stated merely that the association had considered the question "of the administration of sedatives to condemned persons before execution" and had concluded "that this is a matter which is best left to the discretion and the humanity of the prison medical officer."[37] Exploration of this question in detail was clearly not a discussion the medical men looked forward to having.

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[32] BMA memorandum, section II, para. 27, Royal Commission minutes, 2/3/50.
[33] BMA memorandum, section II, para. 28, Royal Commission minutes, 2/3/50.
[34] BMA memorandum, section II, para. 29, Royal Commission minutes, 2/3/50.
[35] BMA memorandum, section II, para. 29, Royal Commission minutes, 2/3/50.
[36] BMA memorandum, section II, para. 31, Royal Commission minutes, 2/3/50.
[37] BMA memorandum, section II, para. 32, Royal Commission minutes, 2/3/50.

As carefully developed in the memorandum, the BMA's position sought to affirm the profession's authority within its realm of expertise, without extending its claims beyond this realm. The same task belonged to the BMA's chosen representatives before the Royal Commission, which typically approached expert witnesses as a politely skeptical lay audience. Much of the hearing, as with the BMA's examination of other witnesses, amounted to elaboration of the professionals' views and the presentation of supporting evidence. The commission members did little to challenge the doctors' descriptions of mental disorders that affected the ability to act, or not act, regardless of knowledge of the significance of the action, and the lack of provision for such cases under the M'Naghten Rules.[38] The BMA's suggested amendment of the rules also elicited little debate (perhaps because that the witnesses made it clear that the BMA did not consider that its role was to insist on any particular language). "Diminished responsibility" actually proved more troublesome, because the concept cut more than one way—if it kept partially irresponsible defendants from being fully shielded by an expanded definition of irresponsibility, then it would also be used to try to defend those who deserved to be held fully responsible. Chairman Gowers told the medical witnesses that he considered the doctrine "dangerous," because it might be "interpreted too leniently by emotional members of the jury" and with too great variations among judges.[39]

Methods of execution also brought a brief but revealing confrontation between the claims of the BMA witnesses and the apparent inclinations of the commissioners.

[38] Examination of Witnesses, paras. 3945-3953, Royal Commission minutes, 2/3/50.
[39] Examination of Witnesses, para. 3934, Royal Commission minutes, 2/3/50.

Gowers asked the witnesses to explain the "practical difficulties" of lethal injection. Was it "merely a technical difficulty of skill"? Dr. R. G. Gordon (who had chaired the BMA's capital punishment committee) replied:

> Yes. Of course it is easy enough to give an intravenous injection if the patient is expecting it and willing to co-operate because he knows it is going to do him good and save him pain; but it would be a very different matter with a criminal who knew that this was the end, and who probably would not submit to it in the same way as a patient in hospital would. We feel that if there is not complete cooperation on the part of the subject it is a matter that would be very difficult to carry out with any certitude, that is to say, the slightest struggling would mean that the needle would either slip out of the vein, so that he would not get the injection, or go through the vein and the injection go into the tissue.[40]

But why not make the "patient" unconscious first? This was equally unacceptable, according to Dr. Gordon: "We feel very strongly that it is most undesirable that a doctor should act under any rule or instruction or regulation whereby he is, so to speak, forced to give any kind of medication. That is our objection to that on principle." Prison medical officers might offer sedatives based on their own judgment, or as an act of compassion, but not as a responsibility under execution procedures.[41] The BMA's position had clearly been crafted so as to keep physicians out of actual participation in executions.

The medical men would not be drawn into the process—and neither were they willing to delegate their role in the process to others. Gowers asked whether a doctor was necessary for a lethal injection. Dr. T. Rowland Hill (one of the other BMA representatives) answered:

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[40] Examination of Witnesses, para. 4039, Royal Commission minutes, 2/3/50.
[41] Examination of Witnesses, para. 4040, Royal Commission minutes, 2/3/50. Also see para. 4046.

> An intravenous injection is a highly skilled procedure that would really have to be done by a doctor. In practice in the hospitals one meets occasionally with an experienced hospital sister who does intravenous injections, but that is very exceptional. It must be borne in mind that, although with some people an intravenous injection would be quite easy, there are quite a number of people with whom it is technically extremely difficult, and sometimes it is quite impossible.[42]

One of the commissioners, Dr. Eliot Slater (an eminent psychiatrist, and the only physician appointed) tried to compare the current procedure for hanging—obviously requiring great skill, but no medical qualifications—with what the BMA was insisting on. If doctors would not perform lethal injections, why not train others to do so? Dr. Gordon's reply was brief but conclusive: "The Committee felt that that training, having the object that it has, should not be given by medical men. That was the opinion of the Committee."[43] The profession would neither sanction participation by its own members nor facilitate the participation of others.

As they took their stand before the Royal Commission, the leaders of the BMA knew that the medical profession actually was not united in support of their position. The evidence given by the Royal Medico-Psychological Association showed the commission what the BMA Council had already learned—that the gap between the BMA and some of the leading psychiatrists was deep and wide. At the time of the Atkin Committee the RMPA had basically shared the BMA's criticisms of the M'Naghten Rules, but had suggested abolishing rather than amending them. But now, somehow, even as the RMPA had grown more dismissive of the rules themselves, its position on criminal responsibility had swung toward that of the judicial establishment. The RMPA's representatives told

[42] Examination of Witnesses, para. 4042, Royal Commission minutes, 2/3/50.
[43] Examination of Witnesses, para. 4048, Royal Commission minutes, 2/3/50.

the commission that the courts in recent years had stretched the rules to the point of abandonment—and that "justice is better served as the result."[44] It was best to leave in place rules which, because of their known obsolescence and inapplicability, effectively left judges free to issue jury instructions based on their own best judgments. "If you did get a better substitute," one of the RMPA witnesses argued, "you might have it very rigidly interpreted and get a worse position than at present."[45] The existing flexibility, in the RMPA's view, actually allowed for the consideration of "diminished responsibility" and made the BMA's proposed degrees of guilt unnecessary as well. Pressed by the commissioners to explain the evolution of their views, the RMPA witnesses suggested that, as frequent expert witnesses, they preferred not to challenge the judges' preference for established rules—especially when they had little to gain from the fight, in terms of their ability to express their own judgments. "One has certain embarrassments in being cross-examined, because one never knows what the Judge is going to let one say," said one of the witnesses. "But in my experience they let you have pretty wide rope."[46]

Given the conflicting evidence and views on criminal responsibility that had been offered, the Royal Commission members shared perhaps a surprising degree of consensus—but still they faced divisions of their own. The commissioners generally agreed that the M'Naghten Rules "could not be considered a theoretically successful criterion of criminal responsibility" and—despite all the evidence given by judges, other officials, and the RMPA—they also agreed that the rules "did not in practice exempt

[44] "Memorandum Submitted by the Council of the Royal Medico-Psychological Association," part III ("The M'Naghten Rules and 'Guilty but Insane'"), para. 11, in Royal Commission minutes, 5/4/50. Also see Examination of Witnesses, paras. 6638, 6639, 6656, 6666, and 6667.
[45] Examination of Witnesses, para. 6638, Royal Commission minutes, 5/4/50.
[46] Examination of Witnesses, para. 6638, Royal Commission minutes, 5/4/50.

from responsibility all those who ought in principle to be exempted."[47] The fault line was between those who believed the M'Naghten Rules should be disposed of entirely and those who insisted that they should be retained in some form. Several of the commissioners (including Dr. Slater, and the veteran Home Office civil servant Sir Alexander Maxwell) believed that the tendency of judges and juries to work around the existing rules weighed against any effort to impose specific rules—so therefore the juries should be given a broader question (such as whether the defendant's mental illness caused a given action) which would fully contain the actual issue at hand. On the far end of the opposite divide, Leon Radzinowicz (then still rising toward his later eminence as a criminologist and historian of criminal justice) believed abolition of the rules would do little to simplify dilemmas for medical witnesses that were rooted in the "complexities of human personality." Even trying to amend the rules, he argued, would run into certain facts of political life:

> The great difficulty about *extending* the Rules was that the medical witnesses who had appeared before the Commission had not been unanimous in desiring that this should be done; this difference of opinion within the medical profession showed how difficult the problem was. Any facile solution must therefore be treated with suspicion, and since any change would certainly meet very strong opposition, it ought to be supported by overwhelming arguments.[48]

Ultimately no position was fully satisfactory—and this may have raised the importance of pragmatic political considerations. Chairman Gowers himself supported abolition, but he

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[47] "Minutes of the Seventeenth Meeting," January 4-5, 1951, pp. 4-5, in Royal Commission on Capital Punishment: Evidence and Papers, Box HO-301/2, The National Archives, Kew. (Hereafter the minutes of the Commission's closed meetings—as distinct from the "Minutes of Evidence" from its public hearings—are cited as Minutes, Royal Commission.)

[48] Minutes, Royal Commission, 1/4-5/51, p. 6.

agreed with Radzinowicz that, especially if the Commission itself proved divided and even if it achieved unanimity, "it was unlikely that such a recommendation would be accepted and it was doubtful whether such a radical change was consonant with the normal process of development of English law."[49] He proposed, as a compromise, that the report should say that while the majority of the commission believed the M'Naghten Rules should be abolished, "practical considerations had led them unanimously to recommend a less fundamental change." The report language eventually followed a similar formulation.

Despite the compromise that Gowers devised, the commissioners continued to spar with each other over their disagreements over many months that followed. Maxwell, Slater, and others continued to assert that the rules should be abolished and that the commission should recommend doing so. At one point the commissioners voted to approve this recommendation. But Radzinowicz kept raising possible practical difficulties following from the abolition of rules—and the political impracticality of the recommendation. In June 1952, citing a recent appeals court ruling, he said it showed once again "that the judges would strongly oppose any attempt to abolish the M'Naghten Rules. Whatever the merits of the case for abolition, the attitude of the judges, in view of their practical experience, would carry great weight with public opinion and with Parliament."[50] With several alternative formulations on the table—and the assumption that any of them might be disregarded just as the existing M'Naghten Rules apparently were—Gowers again intervened to try to split the differences. The existing draft chapter,

[49] Minutes, Royal Commission, 1/4-5/51, p. 6.
[50] Minutes, Royal Commission, 6/5/52, p. 1.

he suggested, should be revised to say "that, if it was thought essential to have some rules, such and such a proposal appeared least open to objection, but that all (or most) Members of the Commission considered that it would be better to dispense with rules altogether."[51] The final text followed directly from this suggestion.

On the question of criminal responsibility, the BMA—as the leading voice insisting that the flaws in the rules made it necessary to change the rules and practices—had succeeded (perhaps better than its leaders expected) in setting the bounds of the debate within the commission. The fact that most of the commissioners actually wanted to go beyond what the BMA was willing to recommend (abolishing the M'Naghten Rules rather than amending them) inevitably begs the question of whether the BMA itself might have gone farther. The cautious tone and substance of its recommendations suggests a preoccupation with forging a moderate consensus, both within its own ranks and among other groups of medical professionals (such as the Institute of Psycho-Analysis and the Institute for the Scientific Treatment of Delinquency, both of which seconded the BMA's arguments and recommendations). Still, with the RMPA breaking ranks, the BMA's limited ability to offer realistic proposals for drastic change must have been obvious. And, in fact, Radzinowicz proved correct in anticipating the fate even of the recommendations that the Royal Commission tailored so carefully before putting forward. Given the resistance to change within the judicial establishment, the BMA had little real hope of sweeping aside the formal rules which determined whether convicted murderers lived or died. What it could do—and did—was to help delegitimze them.

[51] Minutes, Royal Commission, 6/5/52, pp. 2-3.

The more serious challenge to the BMA's agenda—and the more serious possibility of modernizing the death penalty—came from the commissioner members' skeptical response to the association's position on lethal injection. The commissioners clearly recognized the position as a calculated effort to head off the development of the procedure by ruling out physician involvement. Sitting in with the commission in July 1951, Sir Frank Newsam (the top-ranking civil servant at the Home Office, and lead-off witness at the first formal hearing) told the commission members that he hoped to see a recommended alternative to hanging, "which he personally regarded as barbarous."[52] One commissioner (Florence Hancock) supported lethal injection "after the condemned man had been rendered unconscious." Dr. Slater then said "that the difficulties of this course had been exaggerated; it would require little training to inject a drug into an unconscious man." The commission agreed to seek further guidance on this subject from an "experienced anaesthetist" and agreed to ask the BMA for a reference. [53]

The direction of the commission's further inquiry could not have been reassuring to the BMA leaders. A private meeting that October with Dr. Geoffrey Organe (a prominent anaesthetist) reinforced the commissioners' sense that there were perfectly feasible ways to introduce lethal injection—at least as an option. Dr. Slater said that Dr. Organe's evidence "showed that intravenous injection would be a painless, humane, and practicable method of execution, which would give rise to no administrative or

[52] Minutes, Royal Commission, 7/5-6/51, p. 8.
[53] Minutes, Royal Commission, 7/5-6/51, p. 8.

psychological difficulties provided that the injection were made an alternative to, and not simply a substitute for, hanging."[54]

A clearer understanding of what was actually being offered to the commission came when Organe and several other anaesthetists (speaking for themselves, not for their specialists' organization) came to give evidence in public two months later. In a memorandum to the commission, the anaesthetists offered a vision of lethal injection as an ordinary alternative within a system of capital punishment—but an optional one, available only under certain conditions. Dr. Organe and his fellow witnesses discussed alternative drugs with comparative effects (ultimately endorsing a single dose of "a short-acting barbiturate," either hexobarbitone or thiopentone). But whichever drugs were chosen,

> intravenous injection requires a fair degree of skill which can be maintained only by constant practice. Workers in veterinary surgery and in animal laboratories have the necessary skill. The executioner should have no connection or association with the medical profession.
>
> Intravenous injection is not possible in all cases.
>
> Intravenous injection would be more difficult in a struggling subject and the idea is repellent. It should be offered as an alternative, pleasanter method of executions and should be used only when it has been willingly accepted.[55]

The commission developed each of these claims at length in the hearing. While the commission had expected the anaesthetists to show how much more feasible lethal injection was than the BMA had claimed, the more telling point surely involved the limits of what anaesthetists themselves would actually do. What made lethal injection perfectly

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[54] Minutes, Royal Commission, 10/4/51, p. 1.
[55] "Statement of the Views of Consulting Anaesthetists: Alternative Methods of Execution," para. 5, in Royal Commission minutes (*Minutes of Evidence*), 12/6/51.

feasible, they said, was the level of skill at "venepuncture" attained by laboratory technicians. Neither the anaesthetists present nor any members of their specialty organization would perform the procedure on condemned prisoners. Perhaps technicians might also be unwilling but, as Dr. Organe put it, "You cannot tell until you have tried recruiting them."[56]

Moreover, the fact that lethal injection was unsuited for various cases meant that it would never serve to replace the gallows entirely. At the commission's insistence, the anaesthetists offered a lengthy, gruesome set of explanations of the techniques of venepucture and the difficulties posed by physiology, in some cases, or by uncooperative patients. "Certain arms," observed Dr. Alexander Low (president of the Association of Anaesthetists), "have no visible veins. In other words, you get the rather plump individuals who have veins, naturally, but they also have a layer of maybe an eighth of an inch or more of fat over the top of the veins, which makes it quite impossible to see them."[57] In other cases, veins would shrink, due to cold or anxiety, and anyone looking for a vein would have to bathe the arm in warm water. Any movement on the part of the patient would make it impossible to catch the vein with the needle (and not pierce the other side of the vein). This actually even ruled out the possibility of rendering subjects unconscious first, because reflex movements would still occur. By the end of the hearing, it was clear to the commissioners that even doctors who refused to endorse the BMA's position were not inclined to offer up lethal injection as an easy option or smooth over the practical obstacles.

[56] Examination of Witnesses, para. 9025, Royal Commission minutes, 12/6/51.
[57] Examination of Witnesses, para. 8955, Royal Commission minutes, 12/6/51.

This evidence did not dictate the committee's conclusions, but its impact was decisive nevertheless. Like its skepticism about the BMA's position, the commission's discussions immediately after the anaesthetists' hearing clearly reflected its own clear determination to recommend lethal injection—if it had been given a way to do so. Commissioner Hancock "said that she had been ready to support an alternative to hanging, but she had been very much discouraged" by the anaesthetists. Another commissioner, Sir Edward Jones, went so far as to say that "personally, he would prefer to be hanged and he could not bring himself to support any recommendation in favor of an injection." Still others (such as Gowers, and Newsam, once again sitting in) still hoped for some alternative to recommend because hanging, they believed, was "barbarous" and must be ended. But the wind had shifted. The commission secretary, Francis Graham-Harrison, even began coming up with further likely problems, beyond what the anaesthetists had cited: "It appeared that intravenous injections were difficult if the patient flinched, and impossible if he struggled. Was he not more likely to flinch from a lethal injection than from an injection for ordinary medical purposes?" Yet another concern: "Lethal injection would also differ from all other methods of execution in one important respect: the executioner would be required to cause the prisoner's death by an operation involving direct contact with his body, not indirectly by the mechanical operation of a switch or lever. This would be most distasteful to many qualified persons." Gowers finally interrupted Graham-Harrison and told him to draft a report chapter on execution methods without stating any conclusions.[58] Ultimately the commission decided to list the pros and cons of lethal injection, while stating that it had

[58] For all quotations and paraphrases in this paragraph see Minutes, Royal Commission, 12/6-7/51, pp. 3-4.

unable to agree on substituting this method for hanging at the present time. It recommended reconsidering the practicality of the option as techniques evolved further.[59]

When the full report of the Royal Commission finally was published in 1953—well after the Labour government that appointed the commission had passed from the scene—its painstakingly documented chapters and nuanced, ambivalent conclusions ended up serving functions far different from what had originally been intended. Its various (mostly small-bore) positive recommendations to Parliament were first ignored, then dismissed by the Conservative leadership. Instead, the report became more a symbol of the loosening grip of capital punishment on "respectable" opinion among governing-class circles. Given its narrow original terms of reference and the distance separating its members from the likes of the Howard League, what was crucial was the very fact that the commission did not perform as expected—that it did not find, in the advanced realms of law, science, and medicine, the solutions to the death penalty's problems.

One of the concluding notes struck in the commission report elicited wide comment, as an example of testing the boundary of the commission's mandate. On the question of degrees of murder, the commission had ultimately failed to find criteria for degrees and instead recommended expanding jury discretion over sentencing, as a way of allowing for mitigating circumstances. The commission acknowledged that many others were bound to advance a contrary view:

[59] See Minutes, Royal Commission, 2/7/52, p. 2 (specifically comments by Slater and Sir Alexander Maxwell), and Royal Commission report, Chapter 13, specifically para. 749 (p. 261).

> If this view were to prevail, the conclusion would seem to be inescapable that in this country a stage has been reached where little more can be done effectively to limit the liability to suffer the death penalty, and that the issue is now whether capital punishment should be retained or abolished.[60]

The implicit necessity of abolishing a practice that one would prefer to be able to improve (but could not) was the commission's parting message to its official and public audiences. Even such a message—perhaps the most powerful support for abolition that a royal commission could offer, amplified by the high standing and political detachment of its source—could not move Britain much closer to abolition; other circumstances would be required and further parliamentary struggles would ensue. But a teleological standard of assessment fails to account for the real likelihood that the commission could have reached other conclusions, and spent its prestige on reaffirming the legal foundations of capital punishment and modernizing its procedures. This outcome was averted by the leaders of the medical profession—not because they were abolitionists, but because they would not acquiesce in existing practices or proposed procedures that violated their professional values. When called upon by the commission to speak on their profession's behalf, the leaders of the BMA affirmed these values, despite the divisions among doctors that actually existed. The outcome reflects both the particular choices made by key actors in the leadership of the profession (such as Dr. Gordon) and the structural conditions (the physiology, in a sense) of a political system which made the muffled voice of medicine speak decisively in the debate.

[60] Commission report, para. 611, p. 214.

II.

In a newspaper profile from 1988, Dr. James P. Grigson, perhaps the most famous (or notorious) physician in Dallas, reflected with some frustration on the nickname—Dr. Death—by which he was best known to the rest of the world. "Stop for one second and think," he said, "of how many children, men and women are walking around today alive because we incarcerated or terminated individuals who could be identified as people who are going to continue to kill." So, he claimed, "it would be more appropriate, if you were going to put a tag on me, to put Dr. Life." The reporter followed the doctor to the courtroom, where he offered a typical display of his arguably death-dealing—or life-saving—work as a witness. The description contained in the story was fairly typical of contemporary efforts to capture the doctor at work:

> His tone is always modulated, precise, direct. The word that comes to mind watching him is "patrician."
>
> Yet he's like a favorite uncle, the one who took you fishing when you were supposedly sick and had to stay home from school. He's a good ol' boy from Texarkana, oldest son of the man who ran the Rock of Ages tombstone business and the woman who worked for the phone company.
>
> His combination of homespun virtues and unshakable opinions has long carried great weight with juries in Dallas County and other parts of Texas. His demeanor on the stand is legendary, his testimony devastating in its withering straightforwardness.
>
> The classic scene: Turning to face the jury, his back straight and head still, Grigson says, "(Such and such) is the most severe type of sociopath and would commit future crimes if returned to society." It is appropriate for defense attorneys to blanch at this time.[61]

With his well-honed performances, Dr. Grigson created a leading role in the revival of the death penalty in Texas which began in the 1970s and grew into one of the

[61] Steve Levin, "The Life of Dr. Death," *Dallas Morning News*, 9/19/88.

world's most prolific systems of judicially mandated killing. The new system represented a new phase in the state's history of capital punishment, which to this day retains part of the stigma of a vicious past (as did the practice in England, albeit in a different way). Starting after the Civil War, whites in Texas communities (as in other Southern states) used both legal hangings and extralegal rituals of violence to overwhelm Reconstruction governments, enforce a precarious social order, and vent communal fury against transgressors. Both vigilantism and its (often barely distinguishable) legal counterpart, as enforced within localities, targeted black men and asserted racial privilege. Ultimately state leaders felt compelled to try to temper the violence and preempt the worst outrages. In 1923, a new Texas statute took condemned inmates out of the hands of county sheriffs and made state prison officials responsible for administering death by electrocution. Over the next four decades, while the goal of substituting orderly state killing for lynch law may have been achieved in some degree, the accumulated statistical record ultimately left the state exposed to a range of possible challenges on grounds of discrimination, among other constitutional challenges. In 1964, Texas joined other Southern states and the rest of the nation in a moratorium on executions. The hiatus ended up lasting for eighteen years, during which the legal landscape of capital punishment was transformed yet again.[62]

What emerged by the 1980s was a new set of trial practices, sentencing criteria, and execution protocols that included the testimony of expert witnesses like Grigson, as well as other uses of medical expertise and medical symbolism. Grigson and his

[62] The standard analytical treatment of the historical background summarized here is provided in James W. Marquart, Sheldon Ekland-Olson, and Jonathan R. Sorensen, *The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923-1990* (Austin: University of Texas Press, 1994), chapters 1-4.

followers and imitators ultimately made up a cohort of "killer shrinks" who served a specialized function—diagnosing the "future dangerousness" of capital murder convicts—that followed from developments in Texas law and the peculiar drafting of the new capital murder code. Especially during the early years of the revived death penalty regime, the killer shrinks and their vociferous critics struggled with each other, before trial juries and appeals court judges, over how far the use of medicine to facilitate capital punishment could be taken.

The parties to the struggle included local prosecutors, frustrated defense attorneys, representatives of organized medical professionals at the national level, and various individual scholars of law and criminal justice. What was completely missing, all through the period up to the present, was any meaningful participation by the organizations representing the Texas medical profession. Keeping a fixed focus on higher priorities, the Texas Medical Association and its affiliated specialty societies attempted no policing of their own ranks, avoided passing judgment on the use of medical professionals in various roles, and essentially offered no resistance to the medicalization of capital punishment. As a result, Texas prosecutors and legislators were able to use white coats and needles where necessary to legitimize their initiatives and fend off legal challenges. Instead of giving pause, psychiatric evaluation and lethal injection gave capital punishment in Texas the go-ahead.

The relationship between medicine and criminal justice followed largely from the orientation of medicine itself at the state level. In Texas, as much as anywhere, mid-20th-

century medicine was a sovereign profession. Celebrating the 1953 centennial of the Texas Medical Association, chronicler Pat Ireland Nixon proclaimed that the organization "stands out as a towering beacon. From small and uncertain beginnings, it `has come to be one of the sturdiest of state associations."[63] Dr. Nixon's was no empty boast. With its record of success in legislative enactments and its feverish commitment to the war against national health insurance, the TMA exemplified the American medical profession's exercise of political influence in support of guild interests.[64]

Coinciding with the ascendancy of the sturdy state association in medical politics was the birth and spectacular growth of Texas medical institutions—military and veterans' hospitals, aerospace biomedical research installations, new medical schools, and specialized care facilities contained in high-rise hospitals in sprawling medical center complexes—which reflected the postwar boom in federally supported research and development and the growing funding ability of the state.[65] Also at the same time, however, official neglect, underfunded public services, and rudimentary health care still prevailed across much of what remained a poor state. As in the rest of the shadow-crossed Sunbelt—only perhaps most dramatically in Texas—cutting-edge medicine developed amid unsolved problems of public health and basic health care provision, reflecting both the longstanding budgeting practices of the state and the particular priorities of its medical establishment.

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[63] See introductory remarks in Pat Ireland Nixon, *A History of the Texas Medical Association, 1853-1953* (Austin: University of Texas Press, 1953).
[64] See Florita Indira Sheppard, "The Texas Medical Association: History, Organization, and Influence," master's thesis, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin, 1980.
[65] See Chester R. Burns, "The Health Sciences," in Leo Klosterman, Loyd S. Swenson, and Sylvia Rose, eds., *100 Years of Science and Technology in Texas* (Houston: Rice Univ. Press, 1986), and Burns, "Medicine in Texas: The Historical Literature," *Texas Medicine*, Vol. 82 (January 1986).

In its own way, mental health care followed the general pattern, but its scale, scope, and pervasiveness gradually forced philanthropic and professional elites to engage with questions of broad social policy and provision of care. By 1931 the doctors had managed to secure state funding for a psychopathic hospital on the medical school campus in Galveston, and after the war a psychiatric research facility was created among the other specialized hospitals and clinics in the Texas Medical Center. Meanwhile, for decades, the insane asylums and "state hospitals" were overcrowded warehouses, with their limited funding being used almost exclusively for custodial functions. (A "psychopathic hospital" was also set up on the lower floors of the prison hospital at Huntsville, consisting basically of holding areas and cells with restraints.) Newspaper exposes, and reports by outside agencies such as the U.S. Public Health Service, occasionally reminded the Texas public of the conditions inside the institutions. Eventually organizations such as the Hogg Foundation for Mental Health, which began its activities by advocating for "mental hygiene" among the public at large, began emphasizing the public's responsibility for the institutionalized population.[66] During the 1950s, intermittent legislative efforts brought modest results, given the prohibitive expense of actual treatment provision for a massive institutionalized population. Comprehensive reform during the 1960s required both the availability of federal funds and a broad programmatic shift toward deinstitutionalization and outpatient care.[67]

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[66] See *The Hogg Foundation for Mental Health: The First Three Decades, 1940-1970* (Austin: University of Texas Press, 1970), pp. 11-22.

[67] See K. D. Gaver, "Mental Illness and Mental Retardation: The History of State Care in Texas," *Impact* [bimonthly publication of the Texas Department of Mental Health and Mental Retardation], vol. 5, July-August 1975, and also Joel Warren Barna, "State Mental Health Services: Change Under Pressure," in *House Study Group Special Legislative Report* (Austin: Texas House of Representatives, 1984), p. 4.

As the progressive turn in Texas mental health care slowly proceeded, one focus of reform was in the legal realm. New court procedures transferred new powers to psychiatrists and gave greater weight to medical expertise—perhaps more even than the reformers intended. A survey of the institutions by the business-funded Texas Research League yielded recommendations for changes in the legal structure of the hospital system, and the state board responsible for the hospitals put up no resistance.[68] Supported by a Hogg Foundation grant, a team of University of Texas law professors drafted a pair of bills—a new Mental Health Code and a set of procedures for commitment of the criminally insane—which were enacted in 1957. Both reforms sought to bring standard legal proceedings into accord with up-to-date ideas about mental illness (as opposed to the traditions and stigmas surrounding "lunacy") and to force the state to begin providing treatment instead of mere confinement. In both involuntary civil commitment hearings and criminal cases, the statutes included new requirements for medical examination and diagnosis (a written certificate in civil cases, plus testimony by two physicians in hearings for indefinite commitment, and a requirement of "competent medical or psychological testimony" for commitment of criminal defendants found insane).

Advocates for the new mental health code assumed that to protect the rights of individuals found to be insane—in both civil and criminal cases—it was necessary to keep the court from excluding relevant medical diagnosis and judgments. New

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Gerald Grob chronicles the broad programmatic shift and the significance of federal funding in *From Asylum to Community: Mental Health Policy in Modern America* (Princeton Univ. Press, 1991).

[68] See Texas Research League, "Legal Structure for the Texas State Hospital System," (Report no. 13 in a survey of the Board for Texas Hospitals and Special Schools), and Millard H. Ruud, *Interpretation of the Mental Health Code*, 1st ed. (Austin: Hogg Foundation for Mental Health, 1957).

procedures were supposed to force courts to make use of medical expertise in rendering their judgments. But what happened in practice was that when physicians were given a role, they largely took over the decision-making. Emergency procedures allowed judges to approve a civil commitment for up to ninety days without even having to hold a hearing, as long as the medical forms were signed and co-signed. To be committed indefinitely, patients had to have been already held for the temporary period. This was intended to raise the bar for indefinite commitment, but the effect was to give unchallengeable authority to the institutional physicians who had been observing the patient in question for up to ninety days. At the Austin State Hospital in 1966, a dismayed observer found that indefinite-commitment hearings amounted to quick rubber-stampings of the hospital psychiatrists' uncontested decisions.[69]

The redefinition of criminal responsibility in Texas reflected the same currents of gradual reform, with advocates and representatives of leading professional groups perceiving a responsibility to replace obsolete relics of old-time Texas with modern rules informed by national standards and up-to-date scholarship. The M'Naghten Rules, in Texas as in England, defined criminal responsibility in terms of the cognition of the wrongness of an act. During the 1960s the State Bar of Texas took on two Herculean projects in succession, first proposing a reworking of the code of criminal procedure and then embarking on a complete redrafting of the penal code. The new code of criminal procedure adjusted the rules for insanity pleas at various phases of court proceedings, but

[69] Fred Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill," *Texas Law Review*, Vol. 44 (1965), pp. 427-431. Cohen points out that anyone eligible for indefinite civil commitment had to have been previously subjected to temporary commitment—which effectively placed them at the mercy of the institutional physicians during the later hearing.

left the M'Naghten Rules in place. The penal code effort, pursued by a committee chaired by Dean Page Keeton and staffed by the University of Texas law school, undertook a deeper inquiry into the principles of criminal responsibility and confronted the question of substantive change.

Dean Keeton's committee engaged the same debate over the scientific obsolescence and practical utility of the M'Naghten Rules which had preoccupied the Royal Commission on Capital Punishment and had long resounded in American courts, law reviews, and state legislatures. For over a century M'Naghten defined the standard of criminal responsibility in most U.S. jurisdictions, over the objections of generations of neurologists, alienists, and their successors in psychiatry and clinical psychology.[70] But unlike the English system, the decentralized American judiciary had allowed several variations on the rules. In the 1950s, the release of the Royal Commission's final report had nearly coincided with the landmark D.C. Circuit Court ruling by Judge David Bazelon in *Durham v. United States*, which held a defendant not responsible "if his unlawful act was the product of mental disease or mental defect."[71] Legal observers in Texas, as elsewhere, took note of the alternatives to M'Naghten raised by the Royal Commission and the *Durham* court. But the failings in practice of Judge Bazelon's carefully crafted test—psychiatrists offering diagnoses and theories of illness as conclusive claims about irresponsibility, judges and juries deferring to these claims—kept alive the debate over whether the M'Naghten test remained preferable to any up-to-

[70] A voluminous legal scholarly literature now records the prevalence of the M'Naghten test and the existing variations among states, including those few which sought to incorporate an "irresistible impulse" test. One particularly helpful and well-crafted historical case study is Charles E. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and Law in the Gilded Age* (Univ. of Chicago Press, 1968).
[71] 214 F.2d 862 (1954).

date alternative.[72] The American Law Institute's influential Model Penal Code tried to supersede M'Naghten while identifying the key issues more precisely: a defendant would not be held responsible for his conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law."[73]

Keeton ensured a full hearing before the committee of the case for replacing M'Naghten by assigning the matter to Fred Cohen, one of the young professors whose presence on the law school faculty was undoubtedly viewed by others as an example of the dean's weakness for liberal firebrands. Cohen had stated his strong support for the American Law Institute's effort: "An authoritatively and clearly stated rule that identifies major impairments of cognition, volition, and emotion has the advantages of placing controls on prosecutorial and judicial arbitrariness, bringing criminal responsibility into line with respected psychiatric authority, and providing the jury or judge with sensible guidelines."[74]

The stage was set for a showdown—at least within the committee—over whether the M'Naghten Rules should remain in Texas law. Cohen drafted a new penal code chapter on criminal responsibility that included the Model Penal Code's formula, as well as procedures for insanity pleas, claims of mental incompetence to be tried, and psychiatric examinations and commitments to be ordered by the court. On March 15,

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[72] For a sympathetic discussion of Bazelon's thinking see William Wayne Justice, "Is the Law's Treatment of the Insane Sane?" (Louis Faillace Lecture Series, Univ. of Texas at Houston Medical School, 2002)
[73] Section 4.01 (1), *Model Penal Code* (Philadelphia: American Law Institute, 1985 reprint).
[74] Fred Cohen, "Reflections on the Revision of the Texas Penal Code," *Texas Law Review* 45 (1967) 429 (footnote 56).

1968, the full committee met to consider the draft, section by section, starting with the new formula. Carol Vance, the Harris County (Houston) district attorney, spoke up for most of his fellow prosecutors and law-enforcement officials, according to the meeting minutes: "Most people who committed crimes had some kind of mental defect, and at the same time this was no reason they should be excused." The law, Vance argued, "should encourage people to be responsible." Also, Vance voiced a continuing suspicion of psychiatric experts and their excuse-making diagnoses: "In his interpretation of this definition, a person that was just 'down right mean' could show a history of a violent temper and might come under this definition." The one psychiatrist sitting in as a guest, Dr. Robert Glen, took particular exception to Vance's last argument, and complained about the archaic constraints that M'Naghten placed on expert testimony. Cohen politely acknowledged that Vance had raised the key issue (perhaps anticipating the outcome). In the end the committee members (not including Glen) voted, eight to four, to approve the formula in Cohen's draft. The new penal code itself, with its multiple chapters and various separately controversial provisions, went before the Legislature in 1971 and was finally enacted—with several modifications but with Cohen's chapter on criminal responsibility left intact—in 1973.[75]

Like the mental health code, the redefinition of criminal responsibility in Texas was an achievement for medicine—both a victory for the principles of diagnosis and treatment over prior traditions that predated medical advances, and an extension of psychiatric influence over court case outcomes—for which medicine itself could claim

[75] For the Feb. 9, 1968 meeting, see Stare Bar of Texas, Committee on Revision of the Penal Code, "Summary of Minutes" [concerning Chapter 4, Responsibility] (March 15, 1968), Tarlton Law Library, University of Texas at Austin.

little credit. Change came due to the efforts of leaders of the legal profession, along with various individual advocates (and sympathetic sources of grant funding). Aside from individual participants such as Dr. Glen, the professional organizations of Texas medicine—unlike the BMA, and the RMPA—had no stated position on the M'Naghten Rules or how medicine should inform the determination of criminal responsibility. The TMA did not completely ignore changes in criminal law that affected its members and patients—its monthly publication, *Texas Medicine*, periodically ran articles tracking and explaining legal developments—but it never included these changes among its legislative priorities.[76] It was leaders of other professions (and a few individual doctors) who identified progressive reform with medical standards of diagnosis and treatment, and sought to require authoritative guidance from doctors in reaching difficult but necessary judgments in criminal justice—all while the medical profession itself tended separately to its own interests.

Uninvolved as it was in reforms which were intended to use medical expertise to protect defendants, organized medicine maintained the same distance as the Legislature fulfilled the last precondition—together with the rise of medical influence over criminal trials—for the use of "killer shrinks" in capital cases. This was the death penalty law itself—which was passed in the same regular session of the 69th Texas Legislature (in 1973) as the new penal code. Unlike the years-long efforts to modernize legal codes overseen by the State Bar, the death penalty revival effort ran on a legislative fast track from the beginning, reflecting the nationwide political backlash against the invalidation

[76] See T. C. McCormick, M.D., "Insanity as a defense and the Texas Penal Code of 1974," *Texas Medicine*, Vol. 71 (Sept. 1975), 64-65, and Harold K. Dudley, M.D. et al, "The mentally ill defendant in Texas: a new perspective," *Texas Medicine*, Vol. 72 (Dec. 1976), 68-76.

of all state death penalty laws by the U.S. Supreme Court's 1972 ruling in *Furman v. Georgia*.[77] (Outgoing Governor Preston Smith even summoned a special session of the Texas Legislature in late 1972, which actually passed a bill in the Senate but not the House.) In Texas, as in other states, bill drafters studied the confusing array of separate concurring and dissenting opinions in *Furman*, and many persuaded themselves that since two majority justices were mainly concerned with the irregular application of the penalty, a mandatory death penalty with fewer possible exceptions would be upheld. The original bill passed by the Texas House of Representatives was deliberately crafted as a mandatory scheme, with much debate over the types of murders to be included but no proposals to allow juries to consider mitigating factors in individual cases.[78] The Senate, which debated the House bill, narrowly preferred a scheme with aggravating and mitigating factors based on the Model Penal Code.[79] Even in the Senate, the debate was dominated by questions of constitutionality rather than actual policy.

What was actually enacted, reflecting the haste and chaos all too typical of the end of a general session in Austin, lacked even the questionably serious scrutiny given to the original bills passed separately in the two chambers. The final compromise reached by the conference committee was a death penalty scheme unique to Texas: a set of three "issues," or questions which, if all answered affirmatively by the sentencing jury, would require the death penalty. The crucial one of the three special issues was—and is—

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[77] For discussion of the post-*Furman* backlash see Stuart Banner, *The Death Penalty: An American History* (Cambridge, Mass.: Harvard Univ. Press, 2002), chapter 10, and Herbert Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford Univ. Press, 1996), especially pp. 45-47.

[78] Eric F. Citron, "Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty," *Yale Law and Policy Review*, Vol. 25, no. 3 (2006), p. 165.

[79] Citron, "Sudden Death," p. 167.

"whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[80] The language was worked out by conferees meeting behind closed doors, in the small hours of the night before the closing day of the session, and was hurriedly passed in both chambers with minimal floor debate. Thus, for a law that would determine life or death, no public record of discussion existed to shed any light on the precise meanings of the terms newly introduced and suddenly enacted (such as "probability"). Essentially the legislators got the main thing they needed—a bill passed and signed—and left their own due diligence in the hands of the courts. This would take years to resolve but, nevertheless, for those whose priority genuinely was to see the death penalty upheld and resumed, it was ultimately a very successful outcome.

The enactment of the "future dangerousness" test made prior developments in mental health law, and the authority accorded to psychiatric testimony, part of the legal context of the Texas death penalty. While the farcical final days and hours of the legislative session made the new standard legal, the weight already given to expert medical predictions of future behavior made it viable in the face of the court challenges that the new law had to surmount. What made the future even more dangerous for all Texas capital defendants was the curious combination of power and weakness that now characterized medical expertise itself. Medical authority in criminal trials was not a

[80] The other two original "issues"—whether the defendant's actions that caused the victim's death were "committed deliberately and with the reasonable expectation that the death of the deceased or another would result," and whether these actions were "unreasonable in response to the provocation, if any, by the deceased"—were in practice answered affirmatively in virtually all cases, meaning that only the issue of future dangerousness distinguished the Texas scheme from a *de facto* mandatory penalty. See James W. Marquart, Sheldon Ekland-Olson, and Jonathan R. Sorenson, "Gazing Into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?" *Law and Society Review*, Vol. 23, No. 3 (1989), pp. 449-468.

priority for leaders of the medical profession. This authority was augmented not because doctors and psychiatrists organized to seek and win it, but mainly because others had fought the battle to confer it upon them. Consequently, there was no previously worked-out set of ideas prevailing among psychiatrist-witnesses, or among doctors generally, about how their augmented powers should be exercised, and no professional structures in place that were prepared to enforce any such standards. The way was open for individual practitioners, carrying the weight accorded to the medical profession but unconstrained by professional standards or discipline, to provide *de facto* certification of "future dangerousness" and effectively make Texas death penalties a matter of prosecutorial discretion.

Dr. James Grigson, together with the Dallas County district attorney's office, took up the task. Formerly a psychiatry professor at Southwestern Medical School, Grigson and his students had been drawn into the handling of mental health cases in the Dallas courts by participating in a federally funded research program. Unlike his academic colleagues and most of his fellow practitioners, Grigson liked dealing with criminal defendants and sought out more courthouse work. Eventually he made a full-time job of it, examining criminal defendants and testifying at hearings on their competence and sanity (under the rules of the Mental Health Code and the Code of Criminal Procedure). As judges increasingly responded to encouragement from higher courts to verify the competence of defendants as a matter of course, Grigson became more and more familiar with the routines of examination and testimony. He was at the right place at the right time in 1973, as the new death penalty law went into effect. According to one local

reporter, the DA's office hatched the idea of establishing a defendant's future dangerousness by using testimony from the same psychiatrist who had already examined the defendant for competence.[81] Henry Wade, the longtime Dallas County district attorney and the dominant figure in local criminal justice, was notorious for pitting his assistant DAs against each other and advancing them according to their conviction rates. The DA and the ambitious young prosecutors in his office needed new ways of winning under the new sentencing rules. As fate would have it, the doctor already at work in the courthouse offered a perfect combination of experience, skills as a courtroom witness, speed and volume of diagnostic judgments—and commitment to the same outcomes that the prosecutors were seeking.

As Wade's chief prosecutor Doug Mulder and other assistant DAs started using their new weapon repeatedly in capital cases, their questions and Grigson's answers took on the routine quality of the courtroom terms and procedures applied by experienced practitioners. In these exchanges, however, the doctor was making the exact same deliberately crafted claims about the individual nature and certain future actions of one convicted defendant after another. The Ernest Smith case became the one which brought this *modus operandi* before federal appeals courts and a broader audience.[82] Smith and an accomplice had together robbed a grocery store and killed the cashier. After Smith was arrested and indicted but before his trial convened, the trial judge, R. T. Scales, asked

[81] See Jim Atkinson, "Witness for the Prosecution," *D Magazine*, June 1980.
[82] My reconstruction of the handling of the Ernest Smith case and his trial draws upon the court record as reconstructed and summarized in the defense and *amici curiae* briefs in *Estelle v. Smith*, 451 U.S. 454 (1981); Atkinson, "Witness for the Prosecution"; and George E. Dix, "The Death Penalty, 'Dangerousness,' Psychiatric Testimony, and Professional Ethics," *American Journal of Criminal Law*, Vol. 5, No. 2 (May 1977), pp. 151-214.

Grigson to conduct the usual competence exam. On February 18, 1974, Grigson met with Smith and (as he later testified) spent some ninety minutes carrying out a "complete psychiatric evaluation." He sent a letter back to Judge Scales affirming that Smith was "aware of the difference between right and wrong and is able to aid an attorney in his defense." Having been found competent to stand trial, Smith was then tried and quickly convicted of capital murder.

Under the new death penalty law, Smith now faced the penalty phase of the trial, in which the jury would hear evidence and decide on the three special issues, including his future dangerousness. Ernest Smith was a 26-year-old black man who had served three years in the Army and fought in Vietnam, but had been unable for some years to keep a steady job. To John Simmons, Smith's defense attorney, the convicted defendant stood a reasonable chance in the penalty phase: his accomplice had actually fired the fatal shot, and—more importantly—he lacked a record as a violent criminal (having been convicted only once, for marijuana possession). Mulder began by resting the prosecution's case, "subject to reopening," and Simmons called three witnesses: Smith's stepmother, his aunt, and the dealer who sold him his gun (which had misfired and was defective).

Mulder then reopened his case and summoned a single witness—Dr. Grigson. The doctor's name had not been included on a list of prosecution witnesses that had been given to the court, and Simmons was unprepared for his appearance. Judge Scales overruled the defense counsel's objections, and Grigson began his testimony by citing his professional credentials and his past examinations of between seven and eight thousand

criminal defendants. Affirming that he had carried out the pretrial competence exam, he outlined his standard procedure. Based on this exam, Mulder asked, what was the doctor's diagnosis? Grigson explained that Smith had "a sociopathic personality disorder":

> It is not an illness or a sickness, it's simply a descriptive term . . . . Primarily [sociopaths] are individuals that do not have a conscience that most of us develop at an early age. They have no type—say guilt feelings, remorse feelings. When they, say, do wrong, they are very much aware of the difference between right and wrong. . . . Also, they have a tendency to be able to manipulate people. Since they don't operate on the same type value system [*sic*] with regard to, say, a conscience, they are able to very freely manipulate people without, say, considering, "Well, I shouldn't do that." It's "I can do that and get away with it."

As the testimony proceeded, Mulder led Grigson through a sequence of questions and answers designed to leave the jury only one option. Were sociopaths truth tellers? "Oh, no, sir," Grigson replied. "Only if it serves their purpose. They will tell the truth if it serves their purpose. If it's harmful, whatever distortion of the truth is necessary is what they will use." After the doctor stated that there were varying degrees of sociopathic disorder, Mulder asked what kind of sociopath Smith was. "Well, he would have to be way down to the severe end—at the very end." What was the doctor's prognosis for Smith? "Oh, he will continue his previous behavior—that which he has done in the past. He will again do it in the future." Could Smith ever break the pattern? "No. This is not what you would consider a stage. This is a way of life. . . . It's only something he will continue."

Having identified Smith as a "sociopath," Grigson drew upon his own definition of the alleged condition to assert the specific, lethal circumstances that the sentencing

scheme required. "Mr. Smith does not have any regard for another human being's life, regardless of who it may be. This is what makes him such a very severe sociopath. He has complete disregard for another human being's life." Mulder asked the doctor what could be done for someone with this condition. "We don't have anything in medicine or psychiatry that in any way modifies or changes this behavior. We don't have it. There is no treatment, no medicine. Nothing that's going to change this behavior." So, the prosecutor asked, what was Grigson's opinion about the possibility of Smith's future dangerousness? "Certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so."

Carefully calculated as his direct testimony was, Grigson's improvised responses to cross-examination could reinforce his claims even more effectively—although, in the Smith case, being a surprise witness obviously helped. Not having had the chance to investigate Grigson, Simmons nevertheless tried to expose the doctor as a "hatchet man" making baseless, exaggerated claims—but, bleak as things were for his client, Simmons actually made them worse. Exactly what, he asked, had made Grigson so perfectly certain that Smith was a sociopath, in the course of a ninety-minute examination? Grigson had an answer. In describing his crime to the doctor, Smith had recalled that after his accomplice fired the fatal shot, he himself had "walked around over this man who had been shot—didn't look to see if he had a pistol in his belt or in his coat. . . ." Simmons tried to interrupt, but Judge Scales let Grigson finish his answer:

> Didn't check to see if he had a gun nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very—sort of cold-blooded

> disregard for another human being's life. I think that his telling me this story and not saying, you know, "Man, I would do anything to have that man back alive. I wish I hadn't just stepped over the body." Or, you know, "I wish I had checked to see if he was all right" would indicate a concern, guilt or remorse. But I didn't get any of this.

The jury deliberated for a few hours over the special issues and answered yes to all three questions. Smith was sentenced to die in the Texas electric chair.

In the course of the appeals process, the record of Grigson's testimony made the Smith case into a *cause célèbre* within the legal profession and shaped the debate over Texas capital sentencing within the courtroom and beyond. The overall effect of the testimony was polarizing: from the perspective of defense attorneys and some critically minded journalists, it exposed a pattern of obviously manipulative tactics and clear abuse of professional medical authority, but at the same time it was apparent that what outraged the defense bar was all but lost on jurors themselves (and those segments of the public that Dallas County jurors represented). The spectacle of quackery carrying the day in the courtroom did ultimately provoke a response by mental health professionals, but the ensuing battle made plain the disunity of the medical profession and the limited influence of mental health specialists over legal opinions on a matter of their own expertise. Just as Grigson used his mantle of professional expertise and authority to ensure that convicted murderers got death sentences, so did his critics base their counterattack on the actual state of the art in psychiatric diagnosis and the credibility of those representing the psychiatric profession as a whole. The key argument (made as much by legal advocates as by mental health practitioners) was that claims of certain prediction of future dangerousness had no grounding in medical knowledge. As it made its way to the U.S.

Supreme Court, the Smith case became a vehicle for the confrontation between Grigson's critics and his supporters. What worked to the advantage, in a sense, of the latter was that the very egregiousness of Mulder's handling of the Smith case created several alternative grounds for reversal on appeal. Discreditable as the prosecution's actions were, this did not ensure that Grigson's predictions themselves or the predictability of "future dangerousness" would be discredited.

The automatic review of the Smith case by the Texas Court of Criminal Appeals actually did raise specific criticisms of Grigson's predictions, but these criticisms were withdrawn from the court record under curious circumstances.[83] In *Smith v. State*, Simmons raised a dozen various points of appeal, including the use of Grigson as a surprise witness. The majority of the three appeals-court judges quickly dismissed each point, treating the contentions about Grigson as no more serious than the others. The majority opinion treated Grigson's claims not as arguments by a prosecution witness but as findings by the court's own expert: "His [Smith's] entire conduct was calculated and remorseless, and the jury was justified in finding that this appellant will always constitute a continuing threat to society." Even the way in which the prosecution introduced Grigson as a witness was perfectly fine because, the judges claimed, the doctor was being summoned in rebuttal (since Mulder had initially rested, then reopened his case.) "Since Dr. Grigson had examined appellant prior to trial, his appearance as a witness in rebuttal did not surprise appellant."[84]

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[83] *Smith v. State*, 540 S.W. 2d 693 (1976).

[84] In his scathing commentary, Dix drew attention to the majority's use of Grigson's assertions as information rather than advocacy. The characterization of Smith as "remorseless" showed that the judges "clearly relied upon" the doctor's testimony. "There was no suggestion in the majority opinion that Dr.

But one of the three judges, John Wendell Odom, saw it differently. In his dissenting opinion, Odom specifically challenged both the majority's unquestioning reliance on Grigson's testimony and the testimony itself. He drew attention to the way in which Grigson's damning characterization of Smith followed from the doctor's own definition of sociopathy instead of anything Smith himself had actually said: "Never once did he [Grigson] give any basis other than this: that appellant had no sense of guilt or remorse with respect to the commission of the offense for which he was on trial. . . . The expert testimony went far afield of any demonstrated logical connection to the results of appellant's examination by the psychiatrist." This by itself undermined Grigson's insistence on Smith's future dangerousness, but Odom went on to indicate that his main objection was to the use of psychiatric testimony itself to establish the certainty of future behavior. In one of his key passages, he indicated that Grigson himself was not really at issue: "Dr. Grigson's qualifications as a psychiatrist may be fine, but I find no testimony which qualifies him as an expert in predicting the future." The problem was that "such future-telling testimony" was by itself "admissible under no theory of law and prejudicial beyond belief." Thus, Odom concluded, "I am unable to find that much of the testimony offered was from this side of the twilight zone. The introduction of such highly prejudicial psychiatric speculations deprived appellant of a fair trial at the punishment stage."[85]

Grigson's testimony was subject to doubt, that any other mental health professional might have arrived at other conclusions, or that the testimony may have left the jury with anything other than a complete and accurate picture of the present state of the diagnostic and predictive art." See "The Death Penalty," p. 162.

[85] For the quoted excerpts from the text of Judge Odom's dissent (which was withdrawn before the final publication of the court ruling in the Southwestern Reporter) see Dix, "The Death Penalty," pp. 161-166.

Even Odom's dissent would soon disappear from the record, as the U.S. Supreme Court made clear its prevailing view of the role of psychiatric testimony, with specific reference to the Smith case. After the state appeals court ruled but before its ruling was published, the high court issued a landmark set of rulings and opinions on the new capital-sentencing procedures enacted in several states after *Furman*. One was the case of Jerry Lane Jurek, whose conviction and sentencing in February 1974 were the first under the new Texas death-penalty statute (and, as of then, the only other death sentence yet upheld by the Texas appeals courts). In *Jurek v. Texas*, the defense had pressed different Eighth Amendment claims against the Texas statute, arguing that the special issues failed to resolve the "arbitrary and capricious" aspects of death sentencing which three members of the *Furman* majority had cited.[86] The prosecution's case for Jurek's future dangerousness had not included any psychiatric testimony, but the defense nevertheless criticized the dangerousness standard (as well as the other special-issue questions) as an insufficient safeguard against "capriciousness and discrimination."[87] This opened the way for the Supreme Court majority, in upholding the Texas statute, to affirm the dangerousness standard as well. "It is, of course, not easy to predict future behavior," wrote the authors of the majority opinion. "The fact that such a determination is difficult, however, does not mean that it cannot be made." The opinion cited examples of routine decisions about future dangerousness by judges setting bail, sentencing authorities in general, and parole boards. The task facing juries weighing a death

[86] *Jurek v. Texas*, U.S.S.C. No. 75-5394, Consolidated Reply Brief for Petitioners.
[87] *Jurek v. Texas* reply brief, p. 51.

sentence was "thus basically no different from the task performed countless times each day throughout the American system of criminal justice."[88]

The affirmation of "future dangerousness" was by itself significant, but the *Jurek* majority actually went farther. For the majority justices, the critical issue in *Jurek* and in cases involving other states was whether new post-*Furman* procedures would "allow the sentencing authority to consider mitigating circumstances"—and, in the case of Texas, whether the special-issue questions "allow consideration of particularized mitigating factors."[89] With no other examples yet available of how the Texas statute was applied, in practice, all the way through the state courts, the justices examined the Smith case as described in the Texas appeals court's ruling. In a passage which in retrospect seems almost like a cruel joke, the justices took at face value the Texas court majority's representations about Smith that followed directly from Grigson's testimony—and then went on to assert that the appeals court's citation of Grigson's claims ("the conclusion of a psychiatrist that [Smith] had a sociopathic personality and that his patterns of conduct would be the same in the future") actually served to demonstrate that the court *accommodated* potentially mitigating factors rather than excluding them. Thus the constitutionality of the Texas death-penalty statute rested, in significant part, on the notion that taking Grigson's testimony into account amounted to a safeguard for the defense. Odom's objections to Grigson's conclusions—and to his fellow judges' unquestioning citation of them—went completely unacknowledged. Judge Odom got the

[88] *Jurek v. Texas*, 428 U.S. 262 (1976) at 274-275.
[89] *Jurek v. Texas*, 271-272.

message. Twelve days after the *Jurek* ruling, as the Texas Court of Criminal Appeals dealt with Smith's motion for rehearing, he withdrew his dissenting opinion.

The *Jurek* decision not only upheld the Texas death penalty but clearly indicated the willingness of a majority of the Supreme Court to accept psychiatric predictions of future dangerousness like Grigson's. Others remained determined to force judges—and ultimately the high court—to confront the reality of Grigson's methods and actions. After the withdrawal of Odom's dissent in *Smith v. State,* the most heated response in the ensuing commentary came from George E. Dix, a professor at the University of Texas law school. Stating the obvious after recounting Grigson's testimony at Smith's trial, Dix noted that the doctor's testimony "was—consciously or otherwise—influenced by a strongly-held view as to how the penalty issue should be resolved."[90] For Dix, whose scholarship at the time focused largely on both the death penalty and the role of psychiatry in civil and criminal cases, the Smith case displayed "a total and unobscured abdication by both state and federal courts of the responsibility for assuring that imposition of the death penalty based upon predictive testimony by mental health professionals bear some relationship to accuracy, reliability, or rationality."[91]

Dix's law review article on the Smith case was important not merely for its condemnation of Grigson and the courts' endorsement of Grigson's testimony, but also because it confronted a crucial factor—the absence of constraints on a rogue practitioner representing himself in court cases as the voice of psychiatric expertise. The resolution

[90] Dix, "The Death Penalty," p. 172.
[91] Dix, "The Death Penalty," p. 167.

of the case amounted to a failure of professionalism—an inability or unwillingness to uphold actual standards, even as professional authority was being invoked:

> Mental health professionals who testify in Texas death penalty proceedings do so under circumstances in which there can be no reliance upon the legal profession or the courts to assure adequate scrutiny of the testimony. There is no assurance that defense counsel will point out the lack of support for propositions advanced by prosecution witnesses or contrary positions held by other mental health professionals. If the jury accepts the expert testimony, the state appellate court will give the matter nothing resembling adequate scrutiny. And the United States Supreme Court appears to be totally unreceptive to indications that the assumptions upon which the constitutionality of the entire procedure rests are simply inaccurate.[92]

One arguable implication of Dix's argument was that the failure of the courts to perform a gatekeeping function reflected the psychiatric profession's own failure to assert its standards effectively, even as its practitioners gathered ever more influence over legal outcomes. As the background history of the evolution of mental health law demonstrates, the failure was not just that of mental health professionals themselves, but also of legal advocates and others who actually drove the extension of medical and psychiatric authority over the legal realm because they viewed it as a progressive reform. Since psychiatrists had not organized themselves to demand this grant of authority so as to carry out any particular set of practices, the effect—in Dallas County, and increasingly elsewhere in Texas—was to empower not the profession itself but individual practitioners and opportunistic prosecutors.[93]

In discussing *Smith*, Dix chose to emphasize the past failure of courts and the legal profession, rather than the psychiatric profession itself, to impose standards for

[92] Dix, "The Death Penalty," pp. 168-169.
[93] See John Bloom, "Killers and Shrinks," *Texas Monthly*, July 1978, pp. 64, 66, 68.

court testimony. But in any event, he went on to argue that the psychiatric profession should take on the burden. Mental-health providers themselves should, "in recognition of the apparent fact that any limitations upon such testimony must be self-imposed, formulate their own standards for professionally-acceptable testimony as to the dangerousness of a person."[94] Dix offered a set of proposals which applied to psychiatric testimony broadly—including the civil-commitment cases which had laid the groundwork for the extension of psychiatrists' influence in court more generally. But the main purpose was clearly to constrain the likes of Grigson by forcing courts and witnesses to place greater weight on mainstream arguments within the discipline about what kinds of judgments could be ventured. To qualify as an expert witness, Dix argued, "a mental health professional should demonstrate reasonable acquaintance with the developing literature on prediction and behavior."[95] Witness testimony would be constrained by guidelines governing the examination and diagnosis of a defendant (such as "an exhaustive history," and "a complete and consistent diagnostic framework, with broad professional support"), and assertions about dangerousness should avoid drawing conclusions about matters of law and should be framed as comparisons with rates of probability among members of particular groups (rather than estimates of an individual's percentage likelihood to commit violent acts). Effectively Dix was using the Smith case as a vehicle to try to extend the influence of then-recent work by the American Psychiatric Association's Task Force on Clinical Aspects of the Violent Individual,

[94] Dix, "The Death Penalty," p. 169.
[95] Dix, "The Death Penalty," p. 175.

which had drafted a report in 1974 summing up the state of the art within the discipline and emphasizing the limits of predictive knowledge.

As the *Smith* case proceeded through the federal appeals courts, it became a test case whose outcome was understood as critical to the future of the Texas death penalty. Dix's article fed a debate over psychiatric testimony—and Grigson's practices—between the contending parties in the ongoing case and, to a degree, before the broader public as well.[96] But while the ultimate resolution addressed some of the injustices done to Smith himself by the prosecutors at his trial, its broader significance for psychiatric testimony in capital cases was fairly modest. Despite Dix's framing of the significance of the case, the appeals process never yielded a decision about the legitimacy of Grigson's judgments about Smith. Instead, with Smith's defense team fulfilling its obligation to put forward all potentially mitigating arguments, the courts overturned Smith's conviction because of the use of the competency exam to elicit what was in effect self-condemning testimony by Smith and the use of Grigson as a surprise witness.

The federal district court's handling of Smith's appeal ensured that the case would remain focused on the circumstances surrounding Grigson's testimony rather than the substance of the testimony itself. Four days before Smith's scheduled execution, in April 1977, U.S. district court judge Robert W. Porter issued a stay and agreed to consider Smith's petition for a writ of habeas corpus. Petitioning the judge to dismiss Smith's petition, the Texas attorney general's office referred to Grigson as "an eminently qualified psychiatrist," described Grigson's work as "merely a physician's examination of the health of the defendant," and argued that testimony presented at the punishment

[96] See Bloom, "Killers and Shrinks."

phase could not, technically, be self-incriminating: "It is difficult to perceive a violation of Fifth Amendment rights when such testimony is only to the evaluation of mental condition and is admitted only after a finding of guilt."[97] In refusing to acknowledge the way in which Mulder had played fast and loose with the introduction of Grigson's testimony, the state appears to have encouraged Judge Porter to examine the defense's claims more closely. Porter requested and obtained affidavits from Simmons, Smith's other trial counsel, and Judge Scales which effectively established that Grigson was in fact a surprise witness—the prosecution never listed Grigson as a potential witness, and the trial judge had never formally notified the defense of Grigson's examination of their client, even after the fact. Porter's ruling was essentially based on this finding. "I do not believe," he wrote, "that psychiatric testimony should be excluded per se from the guilt/innocence trial and/or circumscribed in the punishment stage as some legal scholars have suggested." Instead he held "only that when the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial, the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant."[98]

Propelled in part by Dix's arguments, the American Psychiatric Association involved itself in the case as it continued through the appeals courts, arguing for a broader ruling against the use of psychiatric testimony but also affirming the more limited grounds on which the district court had overturned Smith's sentence. Smith's appellate lawyers and supporters together succeeded in keeping the district court's

[97] See *Smith v. Estelle* (445 F.Supp. 647), Defendant's Motion to Dismiss and Answer.
[98] *Smith v. Estelle*, 445 F.Supp. 647, at 657.

decision from being overturned, but they failed to win the broader ruling. For the Fifth Circuit, whose ruling in September 1979 affirmed Judge Porter's conclusions, the prosecution's "irresponsible conduct" actually had the ironic effect of protecting Grigson's testimony itself from being the object of an appellate court ruling, because it was possible to conclude that the prosecution's conduct had preempted an effective cross-examination at the original trial.[99] The APA, which had appeared as *amicus curiae* before the Fifth Circuit, did so as well before the Supreme Court and offered a much-reworked version of the argument against the admissibility of Grigson's testimony *per se*. By this stage of the case, the argument had been refined so as to target not psychiatric predictions of dangerousness generally but specifically long-term ones: "In Texas, the inquiry focuses on the defendant's lifetime, not on a discrete time period where psychiatric expertise might be more relevant."[100] The Supreme Court did not bite. The high court's ruling acknowledged that "some in the psychiatric community" held the view about long-term predictions contained in the APA brief, but went on to affirm the previous rulings on the previously cited Fifth and Sixth Amendment grounds.[101]

The high court, it turned out, would never defer to the American Psychiatric Association as the authoritative voice of psychiatric expertise, or concede that an individual practitioner's prediction of future dangerousness should be kept out of court. With *Smith* having yielded new *Miranda*-like rules for psychiatric examination of murder defendants, the test case on the core issue became that of Thomas Barefoot, who was convicted in November 1978 of murdering a police officer in Bell County (north of

[99] *Smith v. Estelle,* 602 F.2d 694 (1979).
[100] *Estelle v. Smith* (451 U.S. 454), *Amici* Brief of the American Psychiatric Association.
[101] *Estelle v. Smith*, 451 U.S. 454 (1981).

Austin) and sentenced to death after Grigson and one other psychiatrist testified that he was a sociopath. In addition to the familiar psychiatric diagnosis, there was a new procedure for reaching it. Prosecutors had adapted to the appeals of the Smith verdict and the surrounding controversy by avoiding direct examination entirely; instead, Grigson now drew his damning conclusions on the basis of detailed hypothetical questions posed by prosecutors which included the facts of the case established in the guilt-or-innocence phase of the trial. For Grigson and the prosecutors, this proved to be the solution to the legal problem. The federal district and appeals courts rejected Barefoot's appeals, but the defense managed to obtain a stay and brought the case before the Supreme Court. The APA's *amicus* brief essentially repeated its argument in the *Smith* case about long-term predictions of dangerousness, stating that their unreliability "is now an established fact within the profession."[102] Adapting the argument to the developing literature on the subject, the brief cited a prominent new study by John Monahan (a psychologist and legal scholar) which concluded that psychologists' long-term predictions were borne out in roughly one of every three cases. Supporting the fallback argument presented by Barefoot's defense, the APA brief went on to argue that the Court "at a minimum" should recognize the absurdity of drawing certain diagnostic conclusions about Barefoot on the basis of a hypothetical question, and should require diagnostic testimony to be based on an actual examination.

The majority of justices would have none of any of this. Writing for himself and five others, Justice Byron White not only defended the use of predictive testimony but explicitly attacked the APA's claim to speak for its profession. "The *amicus* does not

[102] *Barefoot v. Estelle* (463 U.S. 880), *Amici* Brief of the American Psychiatric Association.

suggest that there are not other views held by members of the Association or of the profession generally," White pointed out. "Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view." Having implicitly accorded Grigson and the APA the same degree of credibility, White argued that whether either of them deserved greater weight was the jury's to decide:

> Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his side of the case. [103]

After the administration of lethal injection to Charlie Brooks in December 1982, the execution of Texas capital-murder convicts identified as dangerous was resumed at a gradually increasing rate. The *Barefoot* decision did not by itself loosen the floodgates, but it did clear the way for the execution of those whose dangerousness had been established by psychiatric testimony. (Both Dallas County prosecutors and DA's in rural counties continued using Grigson to testify in cases where convicts lacked lengthy criminal records. Curiously, Harris County prosecutors elected early on to avoid the use of psychiatric testimony in capital cases, and accumulated a body of practices and case law in which medical expertise did not play a significant role.) Grigson himself continued to ply his trade as an expert witness, issuing his predictable but well-crafted

[103] *Barefoot v. Estelle*, 463 U.S. 880, at 900-901.

diagnoses, well into the 1990s. Dangerousness claims made by psychiatrists remained a feature of the landscape of Texas capital case law, up to the present day.[104]

Ultimately Dix's article, originally intended to motivate the psychiatric specialty to police itself, served as a historical artifact documenting the failures and weakness of organized psychiatry at a crucial early stage in the history of its relationship with courts and the criminal sentencing process. And while the national organization of psychiatrists at least acted, belatedly, the medical profession as a whole remained silent. Far from being drawn into the controversy over the role of medical authority in ensuing death sentences, the Texas Medical Association kept its distance from the fray, as always. In parrying the lunging efforts of defense attorneys to establish his disrepute within the medical profession, Grigson himself confidently portrayed the APA not only as less credible than himself, given his own vast experience, but as culturally alien to the jurors—"a bunch of liberals who think queers are normal."[105] In the absence of censure by the TMA, or any similarly familiar group of peers, Grigson continued to represent professional authority itself—rather than its defiance—posing before juries as the profession's one truly accessible representative. Deprived of an effective appeal to responsible professional authority, defense attorneys and experts appalled by Grigson's methods were forced to construct their own body of knowledge, over time, showing the low incidence of reoffense among convicts who had been labeled conclusively as dangerous, and establishing the lack of factual support for assertions which arguably

[104] See *Deadly Speculation: Misleading Texas Juries with False Predictions of Future Dangerousness* (Houston: Texas Defender Service, 2003).
[105] Trial transcript, *Fuller v. State* (CCA No. 71,046), cited at *A State of Denial: Texas Justice and the Death Penalty* (Houston: Texas Defender Service, 2000), p. 30.

should have been dismissed as farfetched to begin with.[106] For the medical profession in Texas, the failure to counter or constrain Dr. Death was an act of omission as significant as it was silent.

[106] See Marquart, Ekland-Olsen, and Sorenson, "Gazing Into the Crystal Ball," and *Deadly Speculation*, chapter 3, pp. 21-35.

Conclusion

The Pendulum Swings: Politics and Professionalism in Texas Criminal Justice to the Present

During years of change which drastically altered the landscape and society of Texas , criminal justice, like other objects of public policy, reflected the conflicting currents of professional expertise and political partisanship. Throughout the period of the case studies in the preceding chapters, what distinguished Texas from various other states and jurisdictions (while undoubtedly linking it to others) was the balance between professional influence and other established centers of political power. Leading Texas professions historically were far from powerless—both the Texas Medical Association and the State Bar had long defended their interests in state politics and wielded their influence through agencies of state government. But they lacked independent influence over broad areas of policy which involved their members but lay outside their self-defined jurisdictions. Over time pressure arose—mainly through litigation in federal courts—for new practices more in keeping with the standards defined by national professional organizations. As the case studies show, a reorganized partisan political establishment still tended to prevail in the Texas legal and political environment.

What the following years suggested was that partisan victories were not necessarily secure or lasting ones, and that the complex environment—inhospitable though it might be to professionally sponsored reform—also defied control over time by partisan political machinery. As in Washington with the Bush presidency, in Texas the

later years of the Rick Perry governorship were blighted by the arrival of some of the long-term consequences of past partisan maneuverings for short-term advantages. In the criminal justice realm, the key issues before the 80th Legislature—prison crowding, the need for sound statistics and projections, and the crisis that unexpectedly engulfed the Texas Youth Commission—reflected the disastrous practical effects of management subordinated to partisan political priorities. In each area of criminal justice discussed in these chapters, signs of a pendulum swinging back (at least slightly) testified to the degree of openness that actually existed in Texas politics and the visible, meaningful agency of a wide range of actors. Given the diversity of participants and stakeholders in Texas criminal justice, and the pervasiveness of political struggles involving citizen groups, professional experts, and more established centers of power, a range of policy issues and research questions remains to be explored.

After 2003, the response of state lawmakers to the reemerging problem of prison crowding remained shadowed by Governor Perry's item veto of the Criminal Justice Policy Council budget, and his *de facto* firing of director Tony Fabelo, after the regular session of the 78th Legislature. The move against Fabelo shocked participants on all sides of the divide on criminal-justice legislation—district attorneys, defense lawyers, and legislative committee chairmen alike—demonstrating, in a sense, the marginalization of the Governor from a consensus among stakeholders on the value of reliable statistical information and professionally impartial analysis.[1] Speculation over Perry's motives was fed by the cursory explanations offered by the governor's office (citing "fiscal

[1] Polly Ross Hughes, "Fund veto of agency troubling," *Houston Chronicle*, 6/26/03. See especially quoted comments by Williamson County DA John Bradley (aptly cited in the piece as "one of the state's most conservative prosecutors") and Harris County DA Chuck Rosenthal.

management" and claiming that other agencies could take on the council's work).[2] One widely accepted explanation was that Fabelo's unwillingness to bend numbers had placed him in conflict with Perry's then-chief of staff Mike Toomey, a once-and-future lobbyist for private prison operators and a fierce advocate for their interests.[3]

Later. as officials in the governor's office and TDCJ began organizing proposals for new prison construction once again, it became clear that the CJPC's projections and other statistical reporting had been less a good-government nuisance than a practical political necessity. The Legislative Budget Board set up a Criminal Justice Data Analysis Team that performed some of the CJPC's former tasks (i.e. five-year correctional population projections under existing mandates) but not others (recommending policy options to meet lawmakers' stated policy goals). In late 2006, the Sunset Commission's staff report on criminal justice agencies (due for their 12-year reauthorization) cited the lack of any existing entity "to provide comprehensive and ongoing analysis of the criminal justice system to determine its effectiveness and help plan for its future."[4] The commission staff recommended creating anew oversight committee with legislative members that would take on the CJPC's work (which would expressly include a mandate to "determine long-range needs of the criminal justice system and recommend policy

[2] Proclamation by the Governor of the State of Texas (line-item veto announcement), 6/22/03, Office of the Governor. Also see statement by spokesman Gene Acuna in Hughes article, *Houston Chronicle*, 6/26/03.
[3] See Lucius Lomax, "Who Fired Tony Fabelo?" *Austin Chronicle*, 4/30/04, and Jake Bernstein, "They Shot More than a Messenger," *Texas Observer*, 2/18/05. In 2007, Perry's controversial executive order mandating that sixth-grade girls be vaccinated against human papillomavirus (HPV) was linked to Toomey's representation of vaccine manufacturer Merck. The Governor's power (or aspirations to power) over particular matters of policy, combined with his detachment from concerned parties, arguably fostered cronyism as a dominant tendency.
[4] Sunset Advisory Commission, Staff Report (October 2006), p. 20.

priorities for the system").[5] Early in the general session of the 80th Legislature, in January 2007, the chairmen of the House and Senate criminal-justice committees invited Fabelo himself (now a nationally sought-after consultant) back for an extensive briefing on alternatives to new prison capacity.[6] Perry's response was to release an executive order creating a new "Texas Criminal Justice Statistical Analysis Center"—within the office of the governor, and with his main criminal-justice advisor as director.[7] The implicit concession was clear, but the tug-of-war over control over authoritative expertise in state criminal-justice policymaking would continue.

The front-page scandal of the spring 2007 legislative session—the exposure of sexual abuse and administrative cover-ups at the Texas Youth Commission—reflected on both the basic direction of the agency after the 1995 "reforms" and the place of youth corrections in Texas society and government over the decades.[8] The renewed fixation on TYC and its problems suggested an unending cyclical pattern of reform, neglect, and outrage. Even a few of the particulars recalled the Legislature's actions in 1969—the appointment of a special commission to investigate abuse allegations, the secretiveness and defensiveness of longtime agency officials, the involvement of Texas Rangers

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[5] Sunset Advisory Commission, Staff Report (October 2006), p. 24.

[6] See Fabelo, "Justice Reinvestment: A Framework to Improve Effectiveness of Justice Policies in Texas," Justice Center, The Council of State Governments, 2007. The hearing was widely reported in state daily newspapers.

[7] "Perry Orders Creation of Criminal Justice Analysis Center," 1/29/07, Office of the Governor.

[8] The seamy details of serial sexual exploitation of youths by the principal and assistant superintendent at the West Texas State School at Pyote are carefully surveyed by Nate Blakeslee in "Hidden in Plain Sight," *Texas Observer*, 2/23/07. Blakeslee also follows the paper trail of reporting within TYC, cites conclusions of one internal review which were crafted to avoid implicating senior central office staff, and cites the failure of TYC itself or the Pyote district attorney to press legal action against the two men, in spite of voluminous evidence (some of it collected in interviews with Pyote youths by Ranger Brian Burzynski. Subsequent hearings and newspaper reports brought out more damning details about sins of omission and commission by the central office—including the fact that a key internal report was later redacted before being publicly released. See Mike Ward, "TYC report was altered," *Austin American-Statesman*, 3/2/07.

(although the revelations of 2007 were even more incendiary and detailed in documentary evidence which ruled out any continuing defense of the commission or its senior staff). While the proposals to be developed by the legislative joint committee on TYC were still being developed midway through the general session, what was already clear was that the the agency's official claims about its own operations stood exposed once again as a façade, the work of administrators conscious of their inability to serve well the mass of student inmates, given budget constraints, but inured to a political culture of self-protection and promotion, and more than willing to make themselves useful. This time the façade had been developed, with the collaboration of executive director Steve Robinson and his fellow administrators, as part of a process of gubernatorial image-making and polishing, all in preparation for a presidential campaign. The constructed narrative represented the conversion of TYC institutions, by Governor George W. Bush and his loyal agency heads, from an unsafe, out-of-control liberal experiment gone wrong into a model of orderly, disciplined tough love. The commission staff managed to keep funding for several specialized treatment programs—including the Capital Offenders Program, which John Hubner's book had endorsed so powerfully, on the eve of the scandal—but the overall result was to bring institutional conditions back toward the days of Gatesville, with an expanded population of youths sent away specifically to be subjected to harsh discipline, and an underfunded agency that sought to be seen as doing just that. The signs in the spring of 2007 (such as Perry's appointment of his personal aide and veteran fixer, Jay Kimbrough, as a "special master") were not uniformly promising, but the elimination of the appointed commissioners and senior TYC staff at

least suggested that the system's workings and working assumptions would finally be given serious scrutiny once again.

In the realm of prison health care, professionals did dominate—but the dominance had everything to do with the aggressive promotion of vested institutional interests and nothing to do with the ethical or other substantive values of the professions themselves, the defense of which, as so often in Texas, was left up to various outsiders. The University of Texas and Texas Tech medical school heads had captured the prison medical system and divided it between their own institutions in 1994 (prior to the arrival of private managed-care profiteers). The institutions continued to defend their advantages under the legislatively sanctioned arrangement, but periodic reviews drew repeated attention to some of its more unseemly aspects. Judge Justice's effort to defend the 1992 "Final Settlement" in *Ruiz v. Estelle* (which maintained court oversight of health care and several other issues) inevitably failed to overturn the Prison Litigation Reform Act and failed to keep the defendants from terminating the case—but the court's discovery, testimony, and Judge Justice's March 1999 memorandum opinion (which the Fifth Circuit completely overruled) did leave a record of specified deficiencies.[9] Investigative reporters Bill Bishop and Mike Ward of the *Austin American-Statesman* soon took up the court record and plaintiffs' witnesses as the point of departure for their examination of inmate health care. Their four-part series "Sick in Secret" ran in the

[9] See *Ruiz v. Estelle* (37 F.Supp. 2d 855), at 893-903, and 906-907. On medical care Judge Justice ruled—after setting forth in full detail the findings of the plaintiffs' expert medical witnesses—that the findings failed to reach the necessary constitutionally-violative standard of "a systematic pattern of intentional indifference to known medical needs" as recently defined by the Supreme Court. In detailing the findings so fully in the text of the opinion Judge Justice clearly intended both to publicize them and to discredit the Supreme Court's newly articulated, virtually unattainable standard.

newspaper in December 2001, bringing the managed-care system for inmates out of the realm of state audit reports and federal court records and into the public spotlight.[10] Their coverage emphasized both identifiable patterns of compromised care and, perhaps more disturbingly, the medical schools' preoccupation with restricting information and avoiding accountability for compromised care. The quality of care was generally conceded to be outstanding at the TDCJ Hospital on the medical school campus in Galveston, but the unit clinics staffed by pharmacists and other paramedics were different. They contained many of the same kinds of practices—cursory examinations, prescription drugs made available irregularly or not at all, doctors' orders routinely disregarded—that the original litigation had found.

The core of the problem, however, was that no outside entity had any power of inspection or oversight. This was how the medical schools had drafted the enabling legislation, and this was the way they wanted it. The Correctional Managed Health Care Committee, created by the Legislature as the state agency formally responsible for contracting with the providers, was made up of representatives of the providers themselves (two seats for UTMB and two for Texas Tech—plus three gubernatorial appointees added in 1998 following a state audit recommendation). In 1999, the Legislature even took away TDCJ's review of the care being provided in its units by the medical schools. All review functions would be carried out within the university systems themselves, with the information developed kept away from the rest of the world.[11]

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[10] In particular see Ward and Bishop, "'Deadly inadequacies plague inmate wards," 12/16/01, and "Inmates pay price for others' inattention," 12/19/01.

[11] For further statements identifying and criticizing the conflict of interest see Office of the State Auditor, "An Audit Report on Managed Care at the Texas Department of Criminal Justice" (January 1998), pp. 7-8.

Despite the bad publicity, the medical schools have stuck to their desired arrangement. The *American-Statesman* series embarrassed the medical school and university leadership and prompted Mark Yudof, then-chancellor of the University of Texas System, to promise families of inmates that an independent review would be carried out.[12] Instead, the CMHCC ultimately contracted with the Texas Medical Foundation, the review and disciplinary organization which had been set up by Texas doctors as a condition of tort reform legislation. The TMF report, released in January 2005, was a lengthy compendium of statistical information furnished by the medical schools, which included numerous minor recommendations but no broad generalizations. Both the House Committee on Corrections and the Sunset Commission addressed the problems of information and oversight in their reports preceding the 80th Legislature. The Sunset staff argued that "the lack of information about correctional health care fosters a perception of secrecy that clouds public confidence in the system," and proposed a statute specifying extensive data on offender health care to be reported (including quality assurance statistics and aggregate statistics on deaths and disease prevalence).[13] Whether consciously or not, the Sunset staff's references to secrecy as a problem to be overcome appeared to mistake the bug for the feature.

Would the modest swing back toward the values of independent professionalism in Texas criminal justice be sustained? Could it be detected in any other areas of criminal justice, or social policy? The selection of case studies in the preceding chapters and the exclusive focus on sentencing and corrections matters, perhaps questionably, meant that a

[12] See Mike Ward and Bill Bishop, "UT calls for independent review of prison medical care it provides," *Austin American-Statesman*, 10/12/02.
[13] Sunset Advisory Commission, Staff Report (October 2006), pp. 77-82, quote at 80.

host of other possible relationships and topics were set aside. In particular, questions of law enforcement, at the state as well as local level, must be part of any more thorough study of professionals and professionalization in criminal justice. (Police records are notoriously sparse, at least in 20th-century Texas, but the appearance of solid scholarship on the Houston Police Department demonstrates some of the possibilities.[14]) Divisions within the legal profession (among prosecutors, defense lawyers, judges, and other advocates) and between rival professions (doctors and trial lawyers, for example) also remain to be more seriously explored. But these chapters on sentencing and corrections serve to raise questions about justice, the professions, and society and politics which further study may more brightly elucidate.

[14] Dwight Watson, *Race and the Houston Police Department, 1930-1990: A Change Did Come* (College Station: Texas A&M Press, 2005).

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